No. _____

In the
Supreme Court of the United States

DANIEL A. SCHMITT,
Petitioner

v.

CITY OF DETROIT, LORETTA NEAL, MARK VANN, JAMES FLORKOWSKI, BRYANT JENKINS, AND T. W. GRAPHICS,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ALLAN FALK (P13278)
Counsel of Record
ALLAN FALK, P.C.
2010 CIMARRON DRIVE
OKEMOS, MI 48864-3908
(517) 381-8449

CY WEINER
ELIZABETH THOMSON
WEINER & COX, P.C.
Counsel for Petitioner
3000 TOWN CENTER, SUITE 1800
SOUTHFIELD, MI 48075
(248) 351-2200

QUESTION PRESENTED FOR REVIEW

Despite the fact that §7(b) of the Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896, 1909, 5 USC §552a (2004)(note) expressly imposes an affirmative obligation on any "Federal, State, or local government agency" which requests an individual's social security number ("SSN") to inform the individual whether such disclosure is voluntary or mandatory, by what statutory authority such number is solicited, and the uses that will be made of it, did the Sixth Circuit err in holding, contrary to the Eleventh Circuit (and without citing or distinguishing the Eleventh Circuit's decision), that §7(b) has no application to either State or local government agencies because "agency" is generally defined in 5 U.S.C. §552(f) as encompassing only federal agencies, where such definition, by its terms, applies only to another section of the Privacy Act by virtue of 5 U.S.C. §552a(a)(1)?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The petitioner is Daniel A. Schmitt. The other parties to the proceeding at issue are the City of Detroit, Loretta Neal, Mark Vann, James Florkowski, Bryant Jenkins, and T. W. Graphics.

Except for the City of Detroit, a Michigan municipal corporation, and T. W. Graphics, there are no other corporations, limited liability companies, partnerships, limited partnerships, or juristic entities that are parties to this case. No publicly held corporation or entity is involved herein, nor is any party 10% or more owned by a publicly traded entity. All natural persons party to this case are listed in the above paragraph and in the caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Court Rules

Miscellaneous

CITATIONS TO OPINIONS AND ORDERS ENTERED BELOW PER SUPREME COURT RULE 14.1(d)

The Sixth Circuit's decision is reported: *Schmitt v. City of Detroit*, 395 F.3d 327 (6th Cir., 2005) and reproduced in Petitioner's Appendix A ("Pet. Apx. A"), pp. 1a-9a.

The Sixth Circuit's order denying rehearing entered August 10, 2005 is not reported, and is reproduced at Pet. Apx. 10a (Appendix B).

The United States District Court for the Eastern District of Michigan's decision is reported: *Schmitt v City of Detroit*, 267 F Supp 2d 718 (E.D. Mich., 2003), and is reproduced at Pet. Apx. pp. 11a-26a (Appendix C).

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment entered by the United States Court of Appeals for the Sixth Circuit on January 14, 2005 (Pet. Apx. 1a, Appendix A) in this case, as to which the Sixth Circuit has denied rehearing and rehearing *en banc* by order of August 10, 2004 (Pet. Apx. 10a, Appendix B).

BASIS OF JURISDICTION OF THE SUPREME COURT PER SUPREME COURT RULE 14.1(e)

The Sixth Circuit's decision was issued on January 14, 2005; petitioner timely moved for rehearing and rehearing *en banc* on January __, 2005. The Sixth Circuit then denied rehearing and rehearing *en banc* on August 10, 2005, and issued its mandate on August 25, 2005. The jurisdiction of this Court is based on 28 U.S.C. §1254(1). This petition for certiorari is timely in accordance with Supreme Court Rule 13.1 and 13.3.

TEXT OF STATUTORY PROVISIONS INVOLVED PER SUPREME COURT RULE 14.1(f)

This case involves the construction and application of §7(b) of the Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896, 1909, 5 U.S.C. §552a (2004)(note), in connection with the definition of "agency" in 5 U.S.C. §552(f), as well as 42 U.S.C. §§1983 and 1988. The text of these statutes is as follows:

Section 7(b) of the Privacy Act, Pub.L. 93-579, 88 Stat.1909, 5 U.S.C. § 552a (2004) (note)[1], provides as follows:

> Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

5 U.S.C. § 552a(a)(1), which is part of the Privacy Act, provides:

> **a) Definitions.**--For purposes of this section--
> (1) the term "agency" means agency as defined in section 552(e) of this title;
> * * *

5 U.S.C. § 552(f) provides:

> (f) For purposes of this section, the term--
> (1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government

[1] Section 7(b) is not part of the United States Code but it is part of the Statutes at Large, 88 Stat. 1909, and therefore fully effective per 1 U.S.C. §112 (declaring that the Statutes at Large "shall be legal evidence of laws."

controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency;
* * *

28 U.S.C. §1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

42 U.S.C. §1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1988 provides:

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters

conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such

action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

CONCISE STATEMENT OF THE CASE PER SUPREME COURT RULE 14.1(g)

INTRODUCTION

This petition for certiorari brings to the Supreme Court an issue on which the Sixth Circuit has imposed a limiting construction on the federal Privacy Act, refusing to either acknowledge or even attempt to distinguish the contrary decision of the Eleventh Circuit in *Schwier v Cox*, 340 F.3d 1284 (11th Cir. 2003) (Pet. Apx. 31a, Appendix E). The result is that federally assigned and protected social security numbers now have no protection from disclosure and misuse by state or local governments, or by any private actors, in Michigan, Ohio, Tennessee or Kentucky.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner respectfully petitions for certiorari to review the January 14, 2005 decision of the Sixth Circuit published as *Schmitt v. City of Detroit*, 395 F.3d 327 (6th Cir., 2005)(Pet. Apx. A, pp. 1a-9a), on grounds that the decision is clearly erroneous, conflicts with the holdings in other circuits[2], and involves construction of a statute of substantial

[2] And even conflicts with other subsequent decisions, at least as to the federal right of privacy. within the Sixth Circuit itself, *e.g.*, *Barber v*

importance to our nation's jurisprudence as well as to the quintessentially American interest in protecting information of a private nature, improper dissemination of which exposes the victim to identity fraud and other malefactions.

The facts and issues are pithily summarized in the Sixth Circuit's decision as follows:

> Plaintiff Daniel Schmitt received a mailing from the City of Detroit concerning his 2001 income tax obligation. The vendor hired by the City to print these mailings included the recipient's social security number on the envelope. Plaintiff filed suit against the City under § 7(b) of Privacy Act of 1974 ("the Privacy Act"), Pub.L. 93-579, 88 Stat. 1896, on behalf of himself and other similarly situated individuals. [FN1] After the City agreed to include disclosure notices in future requests for social security numbers, the district court granted declaratory relief under the Privacy Act and dismissed all remaining claims pursuant to Fed.R.Civ.P. 12(b)(6). On appeal, plaintiff contends that he is entitled to money damages, attorney's fees, and costs. Because we hold that the Privacy Act applies solely to federal agencies, plaintiff failed to state a federal claim and, as a consequence, his complaint should have been dismissed *in toto*.
>
> As do the federal government and the State of Michigan, the City relies on a person's social security number for tax identification purposes, as permitted by the Internal Revenue Code, 26 U.S.C. § 6109(d)

Overton, 2005 Westlaw 2018134 (WD Mich, August 20, 2005), slip op. p. 3 ("Plaintiffs have suffered a significant degree of harm from the release of their private personal information to the prisoner population of the Ionia Maximum Security Correctional Facility.") (copy provided in Pet. Apx. 56a, Appendix F, at p. 58a).

("The social security account number issued to an individual for purposes of section 205(c)(2)(A) of the Social Security Act shall, except as shall otherwise be specified under regulations of the Secretary, be used as the identifying number for such individual for purposes of this title."). In 2001, the City contracted with T.W. Graphics to print, address, pre-sort, and deliver income tax forms for mailing. The mailing label included the taxpayer's social security number. When this mistake came to light, Mayor Kwame Kilpatrick wrote a letter of apology to the aggrieved taxpayers, promising to "take the necessary steps to prevent such an unwelcome event in the future." Plaintiff's initial complaint was filed on November 26, 2002, ten months after the mayor's apology. The complaint was amended the following January. Section 7(b) of the Privacy Act, which is the claim at the heart of this appeal, provides as follows:

> Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

Pub.L. 93-579, 88 Stat.1909, 5 U.S.C. § 552a (2004) (note).

Throughout this litigation, plaintiff has relied upon this provision for the proposition that local governmental entities, such as the income tax division of the City, are subject to the Privacy Act.

The Sixth Circuit went on to hold that the City of Detroit, not being an agency of the federal government, is simply outside the ambit of the Privacy Act, and thus no remedy for non-federal Privacy Act violations exists, either in equity or at law under 5 U.S.C. §552a(g)(1)(D)(4)(A) (which by its terms applies only to violations of §3 of the Privacy Act, not §7(b)). In so ruling, the Sixth Circuit ignored the unambiguous text of §7(b) of the Privacy Act, which expressly imposes an affirmative obligation on any "Federal, State, or local government agency" which requests an individual's social security number ("SSN") to inform the individual whether such disclosure is voluntary or mandatory, by what statutory authority such number is solicited, and the uses that will be made of it .

Plaintiff timely moved for rehearing and rehearing *en banc* of the Sixth Circuit's decision pursuant to FRAP 35(b)(1)(B) and 40 and 6 Cir. R. 35(a), noting that the Sixth Circuit's decision was in direct conflict with *Schwier v Cox*, 340 F.3d 1284 (11th Cir. 2003). Some seven months later, rehearing was denied on August 18, 2005 without explanation for the unusual delay, and the mandate then issued on August 25, 2005.

REASONS FOR GRANTING THE PETITION

The issue presented—whether despite the fact that §7(b) of the Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896, 1909, 5 U.S.C. §552a (2004)(note) expressly imposes an affirmative obligation on any "Federal, State, or local government agency" which requests an individual's social security number ("SSN") to inform the individual whether such disclosure is voluntary or mandatory, by what statutory authority such number is solicited, and the uses that will be made of it, it nonetheless has no application to either State or local government agencies because "agency" is generally defined by 5 U.S.C. §§552a(a)(1) and 552(f) as

encompassing only federal agencies *with respect to other provisions of the Privacy Act*—is of exceptional importance to the fulfillment of Congress' purpose to protect the privacy of individuals.

Moreover, the Sixth Circuit's decision conflicts with a decision of the Eleventh Circuit, *Schwier v Cox*, 340 F.3d 1284 (11th Cir. 2003), which was neither cited nor distinguished by the Sixth Circuit. Unless the Supreme Court reviews the issue by certiorari, the federal right to privacy will be protected in Alabama, Florida and Georgia but not in Michigan, Ohio, Tennessee and Kentucky. Not only will this invidiously discriminate in the application of a federal statute based on geographical happenstance, as people in our mobile society relocate from one State to another, but the American people may find their right of privacy under federal law, or the right of privacy of people with whom they deal, unexpectedly diminished or enhanced based on a change of residency. This will unduly complicate the efforts of employers, employees, businesses, customers, State and local governments, and others to either comply with federal law or to vindicate their federal rights.

JURISDICTION OF THE DISTRICT COURT PER SUPREME COURT RULE 14.1(g)(ii)

The jurisdiction of the District Court was predicated on 28 U.S.C. §1331 and 88 Stat. 1896 (§7(b) of the Privacy Act).

Issue

Where §7(b) of the Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896, 1909, 5 U.S.C. §552a (2004)(note) expressly imposes an affirmative obligation on any "Federal, State, or local government agency" which requests an individual's social security number ("SSN") to inform the individual whether such disclosure is voluntary or mandatory, by what

statutory authority such number is solicited, and the uses that will be made of it, the Sixth Circuit erred in holding, contrary to the Eleventh Circuit (and without citing or distinguishing the Eleventh Circuit's decision), that §7(b) has no application to either State or local government agencies on the basis that "agency" is generally defined in 5 U.S.C. §552(f) as encompassing only federal agencies.

DIRECT AND CONCISE ARGUMENT PER SUPREME COURT RULE 14.1(h)

Proclaiming an inability to reconcile the supposed conflict between the plain language of §7(b) and the statutory definition of "agency", the Sixth Circuit engaged in a selective review of legislative history to declare, in effect, that Congress framed §7(b) as enacted as a result of a hypothesized oversight. The Sixth Circuit thus rewrote §7(b) to judicially eliminate the words "State or local government" from §7(b) and likewise rewrite 5 U.S.C. §552a(a)(1) to delete the limiting phrase "as used in this section".

Of course, the simple answer is that the Sixth Circuit misread the plain text of 5 U.S.C. §552a(a)(1), as incorporating the definition of "agency" in 5 U.S.C. §552(f) into §7(b) of the privacy act. The Sixth Circuit's fundamental error was in failing to adhere to the text of §552a(a)(1), which limits the incorporation of the definition from §552(f) to "this section." Section 7(b) is not part of §552a(a)(1); therefore, the definition in §552(f) is not applicable to §7(b) of the Privacy Act.

The Sixth Circuit's error becomes manifest as a matter of common sense. The language of §7(b) by its terms expressly extends to "State or local government agencies"; it would have been illogical and self-contradictory for Congress to pass a law applying by its terms to "State or local government agencies" but to define "agency" as

applying only to federal agencies. Congress was not so inept; by not codifying §7(b) as part of 5 U.S.C. §552a and limiting adoption of the definition from §552(f) to "this section" (meaning §552a), it carefully avoided importing such a contradictory definition of "agency". The Sixth Circuit tortured misreading thus imports doubt into a Congressional enactment that, on its face, is clear and unambiguous.

Prior to the Sixth Circuit's decision, there was a split between the district judges in the Sixth Circuit. *Greater Cleveland Welfare Rights Org v Bauer*, 462 F. Supp. 1313, 1319 n. 3 (N.D. Ohio, 1978) held that §7(b) applies post-1976 to local government agencies, whereas in the present case the District Court for the Eastern District of Michigan found that §7(b) does not apply to municipalities, although it did award declaratory relief. *Schmitt v City of Detroit*, 267 F Supp 2d 718 (E.D. Mich., 2003). The Sixth Circuit's decision finds that §7(b) has no application to State or local government agencies despite its specific language, and thus that there is no remedy whatever under federal law for a violation of §7 of the Privacy Act by a non-federal agency.

In order to reach this startling conclusion, and to thus take the unprecedented step of usurping the prerogatives of the Legislative branch (in which the Executive plays an important role by virtue of the veto power) to judicially rewrite a statute—not to conform it to constitutional limitations, but to solve a supposed inconsistency between two statutory provisions—the Sixth Circuit propounded a number of intermediate assertions which are clearly erroneous.

First, the Sixth Circuit incorrectly declaimed that "other courts have likewise concluded that the [Privacy] Act applies only to federal agencies. See *Polchowski v Gorris*, 714 F.2d 749, 752 (7th Cir. 1983) * * *; *Stoianoff v Comm'r of Motor*

Vehicles, 107 F. Supp. 2d 439, 442 (S.D.N.Y. 2000) * * * ." Precisely these contentions were rejected by the Eleventh Circuit in *Schwier v Cox*, 340 F.3d 1284 (11th Cir. 2003) (Pet. Apx. 31a, Appendix E), a decision completely overlooked by the Sixth Circuit. *Schwier* holds that §7(b) of the Privacy Act does create federal rights enforceable against State and local government agencies under 42 U.S.C. §1983, despite the fact that the defendant was a State official sued in his official capacity—and State agencies are ordinarily beyond the reach of §1983's recognition of a remedy in damages, *Will v Michigan Dep't of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L Ed 2d 45 (1989)—whereas the present case is a suit against a city and its officials, who are potentially liable under 42 U.S.C. §1983 for both injunctive and monetary relief, *Monell v New York City Dep't of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), the Eleventh Amendment having no application to municipalities. *Schwier* opined as follows (full text in Pet. Apx. 31a, Appendix E):

> A. *Whether the district court erred in holding that section 7 of the Privacy Act does not allow for enforcement by a private right of action against state agencies by a suit under § 1983.*
>
> The Privacy Act of 1974 contains only two substantive sections, section 3 and section 7. *See* 88 Stat. at 2177-94. Section 3 of the Privacy Act *applies only to federal agencies* and, among other things, delineates an individual's right to records of federal agencies and right to be protected from disclosure of records by federal agencies. Section 3 contains a comprehensive remedial scheme which includes the right to bring a civil action against a federal agency; however, the remedial scheme of section 3 states that it applies *only* to section 3.

Section 7 of the Privacy Act bars federal, *state*, or local agencies from denying "any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number" to the agency. [FN3] Section 7 of the Privacy Act does not contain its own remedial scheme and is explicitly excluded from the remedial scheme of section 3; thus, section 7 has *no* remedial scheme.

> FN3. The entire text of section 7 of the Privacy Act states:
>
> * * *
>
> (b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.
>
> 88 Stat. at 2194.

1. *The district court's finding that section 7 of the Privacy Act is a "dead letter."*

Within the Privacy Act itself, Congress stated that section 3 was an amendment to Title V, which governs federal administrative agencies. *See* 88 Stat. at 2178. Thus, section 3 added a new section to Title V and was codified as 5 U.S.C. § 552a. *Id.* at 2177. Because Congress made no such statement about section 7 of the Privacy Act, the revisor of the U.S. Code placed section 7 in an "Historical and

Statutory" note following 5 U.S.C. § 552a. *See* 5 U.S.C. § 552a (note). The district court mistakenly placed great weight on this fact. The district court noted that, although section 7 was part of the Privacy Act that "was passed into law as Public Law 93-579," the fact that section 7 "was never codified, and appears only in the 'Historical and Statutory Notes' section of the United States Code," made section 7 a mere "historical footnote to the Privacy Act of 1974 [which] Congress has never reflected any intention of [codifying]." The district court apparently believed that public laws have less "weight" as laws than laws which have been codified. The reverse is true: "the Code cannot prevail over the Statutes at Large when the two are inconsistent." *United States v. Welden*, 377 U.S. 95, 98 n. 4, 84 S.Ct. 1082, 1085 n. 4, 12 L.Ed.2d 152 (1964) (internal quotations omitted).

The district court also stated that section 7 was deleted from the Privacy Act by the Senate Government Operations Committee "before the law was codified into the official code." The district court quotes Senate Report 1183, but the quote demonstrates that the provision that was deleted from the Act pertained only to a business entity's refusal to enter into a "business transaction or commercial relationship with an individual because of [his] refusal to disclose or furnish [his social security] number." S. Rep. No. 93-1183 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6943. Thus, the court's conclusion that section 7 of the Privacy Act had been deleted was error. The best proof of this is section 7's presence in the Statutes at Large. *See* 88 Stat. at 2194; *see also Welden*, 377 U.S. at 98 n. 4, 84 S.Ct. at 1085 n. 4. We therefore conclude that the district court erred in finding that section 7 of the Privacy Act was "a dead letter."

2. *The district court's finding that the remedial scheme of section 3 forecloses a private action for violations of section 7.*

In finding that section 7 does not provide for a private right of action, the district court relied on the Ninth Circuit's holding in *Dittman v. California*, 191 F.3d 1020 (9th Cir.1999), that " '[t]he civil remedy provisions of *the statute* do not apply against private individuals, *state agencies*, private entities, or state and local officials.' " 191 F.3d at 1026 (quoting *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1447 (9th Cir.1985) (first emphasis added)).

In *Dittman*, the Ninth Circuit relied on two cases which involved only section 3 of the Privacy Act. Thus, when the Ninth Circuit quoted *Unt v. Aerospace Corp.* above, the phrase, "the statute," referred to section 3 of the Privacy Act, *not* section 7. *Unt's* holding had no relevance to the facts of *Dittman* or to the present case because in *Unt*, the plaintiff was trying to sue a non-government entity for violations of section 3 of the Privacy Act, which pertains only to federal agencies. *Unt*, 765 F.2d at 1447.

In addition, *Dittman* relied on the Seventh Circuit's holding in *Polchowski v. Gorris*, 714 F.2d 749 (7th Cir.1983). *Polchowski* also had no relevance to the facts of *Dittman* because, again, *Polchowski* involved enforcement of section 3 of the Privacy Act, rather than section 7. In *Polchowski*, the plaintiff sought to sue a state agency under § 1983 for releasing criminal information about him. 714 F.2d at 750. The release of the information would have violated section 3 of the Privacy Act, but section 3 applies only to federal agencies. Thus, the court reasoned, "Congress, by limiting the scope [of section 3 to federal agencies]

has provided unequivocal and persuasive evidence that it intended to foreclose private enforcement of [section 3] against state or local officials who make unwarranted disclosures of statistical information." *Id.* at 752 (internal quotations omitted). In other words, the rights created by section 3 of the Privacy Act do not restrict the activities of *state* agencies.

In *St. Michael's Convalescent Hospital. v. California,* 643 F.2d .369, 1373 (9th Cir.1981), on which *Dittman* also relied, the plaintiffs sought to sue a state agency under section 3 of the Privacy Act. As in *Polchowski,* the plaintiffs sought to sue a *state* agency for violating a section of the Privacy Act which applies only to *federal* agencies. Thus, the Ninth Circuit dismissed plaintiffs' claims. *St. Michael's,* 643 F.2d at 1372.

In summary, *Unt, Polchowski,* and *St. Michael's,* all relied upon by the Ninth Circuit in *Dittman,* were distinguishable from *Dittman* and did not support the Ninth Circuit's holding in that case. *Dittman* failed to recognize that the remedial scheme of section 3 applies only to section 3 and has no bearing on section 7. Thus, the remedial scheme of section 3 provides no basis for concluding that Congress intended to preclude private remedies under § 1983 for violations of section 7. Therefore, we conclude that the district court erred in finding that the remedial scheme of section 3 of the Privacy Act precluded a private right of action via § 1983 for violations of section 7 of the Privacy Act.

3. *The district court's finding that the Tax Reform Act of 1976 limited the scope of the Privacy Act.*

The district court also found that the Tax Reform Act of 1976, which amended the Social Security Act, authorized the states to use ssns for voting. The

court's finding was due in large part to its reliance on *Stoianoff v. Commissioner of Motor Vehicles*, 107 F.Supp.2d 439, 442 (S.D.N.Y.2000), *aff'd*, 12 Fed.Appx. 33 (2nd Cir.2001). However, *Stoianoff* and the district court mistakenly relied on Committee language which was much broader than the very narrow language of the final version of the Tax Reform Act passed into law. *See Stoianoff*, 107 F.Supp.2d at 442. The final version authorizes States to use ssns only "in the administration of any tax, general public assistance, driver's license, or motor vehicle registration." 42 U.S.C. § 405(c)(2)(C)(i) (2003). Thus, the district court erred in concluding that the scope of the Privacy Act had been limited by the Tax Reform Act.

4. *The Privacy Act and §1983.*

In *Gonzaga University v. Doe*, 536 U.S. 273, 283-84, 122 S.Ct. 2268, 2276, 153 L.Ed.2d 309 (2002), the Supreme Court noted that the inquiry into whether a statute contains an implied right of action and the inquiry into whether the statute creates rights enforceable under § 1983 "overlap" in that both inquiries must begin with the question of whether "Congress *intended to create a federal right*." 536 U.S. at 283, 122 S.Ct. at 2275. Here, we ask only whether the Privacy Act creates rights enforceable under § 1983 because this is the issue Appellants raise on appeal.

Section 1983 provides a private right of action whenever an individual has been deprived of any constitutional or statutory federal right under color of state law. *See* 42 U.S.C. § 1983; *see also Maine v. Thiboutot*, 448 U.S. 1, 4, 100 S.Ct. 2502, 2504, 65 L.Ed.2d 555 (1980). In *Blessing v. Freestone*, 520 U.S. 329, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997), the

Supreme Court noted that they had "traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right":

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

520 U.S. at 340-41, 117 S.Ct. at 1359 (internal citations and quotations omitted). [FN4] However, in *Gonzaga*, the Court pointed out that some courts had misunderstood the first factor of *Blessing* to permit a conferred *"benefit"* rather than "anything short of an unambiguously conferred *right* to support a cause of action brought under § 1983[,] ... [which] provides a remedy only for the deprivation of 'rights, privileges, or immunities secured by the Constitution and laws' of the United States." 536 U.S. at 282-83, 122 S.Ct. at 2275 (emphasis added).

> FN4. In *Blessing*, the Supreme Court found that Title IV-D could not be enforced by individuals under § 1983. The Court noted that Title IV-D's "requirement that a State operate its child support program in 'substantial compliance' with Title IV-D" was a "yardstick for the Secretary to measure the

> *systemwide* performance of a State's Title IV-D program" and thus did not confer a right or "*individual* entitlement to services" on "individual children and custodial parents." 520 U.S. at 343, 117 S.Ct. at 1361.

Thus, before we analyze the application of the *Blessing* factors to the Privacy Act, in keeping with *Gonzaga*, we must first ask whether Congress created an "unambiguously conferred right" in section 7 of the Privacy Act. 536 U.S. at 283, 122 S.Ct. at 2275; *see also Blessing*, 520 U.S. at 340, 117 S.Ct. at 1359 ("In order to seek redress through § 1983, ... a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*."). The relevant portion of section 7 states, "It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number." 88 Stat. at 2194. We agree with the Government that this language, aimed at the denial of rights to individuals, is analogous to language cited by the Supreme Court in *Gonzaga* as "explicit 'right-or duty-creating language' ".

Title VI provides:

> "*No person* in the United States *shall* ... be subjected to discrimination under any program or activity receiving Federal financial assistance" on the basis of race, color, or national origin. 78 Stat. 252, 42 U.S.C. § 2000d (1994 ed.) (emphasis added).

Title IX provides:

> "*No person* in the United States *shall*, on the basis of sex ... be subjected to discrimination

> under any education program or activity receiving Federal financial assistance."

86 Stat. 373, 20 U.S.C. § 1681(a) (emphasis added). Where a statute does not include this sort of explicit "right- or duty-creating language" we rarely impute to Congress an intent to create a private right of action. 536 U.S. at 284 n. 3, 122 S.Ct. at 2276 n. 3. In contrast, the relevant language of the Family Educational Rights and Privacy Act of 1974 ("FERPA"), which the *Gonzaga* Court held not to create personal rights enforceable under § 1983 provides:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents to any individual, agency, or organization.

536 U.S. at 278-79, 122 S.Ct. at 2273 (quoting 20 U.S.C. § 1232g(b)(1)). The Court explained:

> Unlike the individually focused terminology or Titles VI and IX ("no person shall be subjected to discrimination"), FERPA's provisions speak only to the Secretary of Education, directing that "[n]o funds shall be made available" to any "educational agency or institution" which has a prohibited "policy or practice." 20 U.S.C. § 1232g(b)(1). This focus is two steps removed from the interests of individual students and parents and clearly does not confer the sort of "*individual* entitlement" that is enforceable under § 1983.

Id., 536 U.S. at 287, 122 S.Ct. at 2277 (quoting *Blessing*, 520 U.S. at 343, 117 S.Ct. at 1353).

Admittedly, the language of section 7 falls somewhere in between the language of Titles VI and IX and that of FERPA. The subject of the relevant clauses of Titles VI and IX is "person," whereas the subject of the relevant clause of the Privacy Act is "it." In other words, if the Privacy Act were worded, "No individual may be denied any right, benefit, or privilege provided by law by any Federal, State or local government agency because of such individual's refusal to disclose his social security account number," the language would be more precisely analogous to that of Titles VI and IX. Nonetheless, the Privacy Act clearly confers a *legal right* on *individuals*: the right to refuse to disclose his or her ssn without suffering the loss "of any right, benefit, or privilege provided by law." 88 Stat. at 2194. Thus, we conclude that Congress created an "unambiguously conferred right" in section 7 of the Privacy Act. *Gonzaga*, 536 U.S. at 283, 122 S.Ct. at 2275. [FN5]

> FN5. In addition, unlike the Privacy Act, the *Gonzaga* court held that FERPA is essentially "spending legislation," which rarely "confer[s] enforceable rights." *Gonzaga*, 536 U.S. at 279, 122 S.Ct. at 2273.

As for the factors of *Blessing*, the language of section 7 is clearly intended to benefit individuals, as discussed above; is specific rather than amorphous; and is clearly mandatory. To read the statute is to see that it easily meets the three criteria of *Blessing*. First, because we have already concluded that Congress created an "unambiguously conferred right" in

section 7 of the Privacy Act, we necessarily conclude that the language is intended to benefit individuals. Secondly, the prohibitions of the statute are clear and specific: no "Federal, State or local government agency [may] deny ... any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number." 88 Stat. at 2194. Finally, the language, "It shall be unlawful" is mandatory rather than precatory. These words indicate a clear prohibition of specific behavior by Federal, State or local government rather than an "aspirational" goal or "yardstick." *See Blessing*, 520 U.S. at 343, 117 S.Ct. at 1361.

However, "[e]ven if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983." *Blessing*, 520 U.S. at 341, 117 S.Ct. at 1360. To establish that the presumption cannot be rebutted, courts must look to whether Congress intended to "foreclose[ ] a remedy under § 1983" either "expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.*

As the text demonstrates, Congress did not explicitly foreclose an action under § 1983. Thus, the relevant question is whether Congress did so "impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement." *Id.* Again, to read the statute is to answer the question. Section 7 contains no enforcement scheme at all. And, as we have explained above, although section 3 of the Privacy

Act contains a comprehensive remedial scheme, section 3 specifically states that its remedial scheme applies *only* to section 3. Thus, the presumption that the rights conferred by section 7 of the Privacy Act may be vindicated via a suit under § 1983 stands, and we hold that the rights conferred by section 7 may be enforced under § 1983.

B. *If the Privacy Act allows for a private right of action, whether Congress exceeded its authority in enacting the Privacy Act, rendering the Privacy Act unconstitutional.*

Cox argues that if Appellants may sue a State for violation of the Privacy Act via § 1983, then Congress exceeded its authority in passing the Privacy Act. Cox argues that the only possible source of authority for the Privacy Act was Congress's Commerce Clause power. The Government argues, however, that Congress's right to establish the use of ssns arises from the "general welfare clause," which authorizes Congress to spend money for the general welfare. This power is "quite expansive." *Buckley v. Valeo*, 424 U.S. 1, 90, 96 S.Ct. 612, 668, 46 L.Ed.2d 659 (1976). In addition, the Government argues, the Necessary and Proper Clause "authorizes Congress ... to adopt measures that bear a rational connection to any of its enumerated powers." *United States v. Edgar*, 304 F.3d 1320, 1326 (11th Cir.), *cert. denied*, 537 U.S. 1078, 123 S.Ct. 679, 154 L.Ed.2d 577 (2002). Thus, the Government argues, because Congress had the authority to authorize the creation of ssns, Congress has the authority to "safeguard[ ] the proper use of social security numbers by prohibiting federal, state, and local governments from conditioning an individual's legal rights on disclosure of his social security number." We agree with the Government

and hold that Congress did not exceed its authority in passing the Privacy Act.

* * *

V. *CONCLUSION*

A. *Privacy Act Claims*

In summary, we hold that the rights conferred by the Privacy Act may be vindicated by a private suit under § 1983. We also hold that Congress did not exceed its authority in enacting the Privacy Act.

340 F.3d 1287-1294.

The Sixth Circuit opinion goes even further astray in finding any inconsistency between the definition of "agency" in 5 U.S.C. §552(f) and §7(b) of the Privacy Act, which by its terms plainly supersedes any such limiting definition by specifying, in clear and unambiguous terms, that its applies to "any Federal, State, or local government agency". Granting that a mere reference to "agency", standing alone, would extend only to federal agencies, Congress could hardly have been more pellucid in bypassing that definitional restriction by including the three unmistakable modifiers "Federal", "State", and "local". The Sixth Circuit thus contravened a cardinal rule of statutory construction by adopting a reading that renders all three modifiers not merely superfluous—which would be error of itself, *Mertens v. Hewitt Associates*, 508 U.S. 248, 258, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) ("We will not read the statute to render the modifier superfluous")—but which proceeds to remove those terms from the statute by judicial fiat, in violation of every constitutional principle of separation of powers. Where at all possible, courts are obligated to give every word of a statute some operative effect. *Cooper*

Industries, Inc v Aviall Services, Inc, 543 U.S. 157, 125 S. Ct. 577, 584, 160 L. Ed. 2d 548 (2004), citing *United States v. Nordic Village, Inc.*, 503 U.S. 30, 35-36, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992). The Sixth Circuit opinion does not even mention these controlling principles.

The Sixth Circuit decision also violates the rule of *noscitur a sociis*, that a word is known by the company it keeps, and in construing a statute, one word cannot be read so as to deprive surrounding words of any substantive significance. *Gustafson v Alloyd Co, Inc*, 513 U.S. 561, 575, 115 S. Ct. 1061, 1070, 131 L. Ed. 2d 1 (1995).

Further, the Sixth Circuit seems to have assumed that once a word is defined by Congress, Congress itself cannot avoid the limitations inherent in that definition by employing words of modification. Once "agency" is defined as limited to federal government agencies, the Sixth Circuit—in violation of the accepted rules of English grammar and syntax—requires that any further descriptive appended words be regarded as surplusage. Congressional reference, however explicit, to "any Federal, State, or local government agency" in §7(b) of the Privacy Act must, in the Sixth Circuit's view, be read to say "any agency", because "agency" is defined in 5 U.S.C. §552(f) as referring only to "federal agencies". Thus, if Congress were to enact a tribute to Babe Ruth, and included therein a definitional section stating that "As used herein, "Ruth" means "George Herman 'Babe' Ruth", but then provided in the operative portion of the legislation that a pension be provided to "Babe Ruth and his wife Helen Ruth during their lifetimes", the Sixth Circuit would find that the pension was payable only to Mr. Ruth during his lifetime, because "Ruth" must be read to refer only to Babe Ruth, and thus cannot be understood to extend to his wife, despite the express statutory language. Such a method of statutory construction not only defies the rules of English, but contravenes the bounds of logic; a

limiting definition applies *unless the context of a statute using the defined term precludes such a reading.* When words of modification are included in a statute in association with a defined term, the words of modification must be given their sway, because every word of a statute must be treated as relevant and material. Here, of course, the limiting definition of "agency" in 5 U.S.C. §552a(a)(1) applies only to §3 of the Privacy Act, 5 U.S.C. 552(f) ("As used in this section . . ."), and not to §7(b).

Moreover, a statutory term may have different meanings even as between succeeding subparagraphs of a single enactment. Thus, in *Nat'l Organization for Women v. Scheidler*, 510 U. S. 249, 258 ff, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994), the Supreme Court construed "enterprise" as importing an element of economic motivation when used in 18 U.S.C. §1962(a) and (b), but not for purposes of §1962(c).

Indeed, in *Scheidler* this Honorable Supreme Court was critical of lower court constructions based on legislative findings:

> "We also think that the quoted statement of congressional findings is a rather thin reed upon which to base a requirement of economic motive neither expressed nor, we think, fairly implied in the operative sections of the Act."

If even Congressional findings, incorporated into the actual enactment, fail to warrant adopting a construction that deviates from the plain text of the operative sections, *a fortiori* the Sixth Circuit decision's reliance here on selective statements from S. Rep. 93-1183, reprinted in 1974 U.S.C.C.A.N.6916, 6932-6933, reflects a flouting of Congress' intent as expressed in the actual language of §7(b). Note that in *Schwier, supra*, 340 F.3d at 1288-1289, the Eleventh Circuit

quoted other pages of the very same S. Rep. 93-1183, 1974 U.S.C.C.A.N.6916, 6943:

> The district court quotes Senate Report 1183, but the quote demonstrates that the provision that was deleted from the Act pertained only to a business entity's refusal to enter into a "business transaction or commercial relationship with an individual because of [his] refusal to disclose or furnish [his social security] number." S. Rep. No. 93-1183 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6943. Thus, the court's conclusion that section 7 of the Privacy Act had been deleted was error.

The Sixth Circuit's decision thus elevates a misunderstanding of the quoted portions of the Senate Report (which, even as quoted by the Sixth Circuit, speaks of "State, local and private data banks", saying nothing about "State and local government agencies") into an excuse to judicially revise the statute by striking therefrom the language Congress chose to include and which the President accepted.

Because of the manifest errors that permeate the Sixth Circuit's decision, and the resulting conflict with the Eleventh Circuit's *Schwier* decision—neither cited nor distinguished by the Sixth Circuit—certiorari should be granted, the decision of the Sixth Circuit should be rejected, the declaratory relief granted by the district court affirmed, and the cause remanded to the district court for the purpose of awarding damages under 42 U.S.C. §1983, and attorney fees pursuant to 42 U.S.C. .

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that his petition for certiorari be granted, or alternatively that pursuant to Supreme Court Rule 16.1 that the Court summarily reverse the lower court orders in this cause and direct that the cause be remanded to the United States District Court for the Western District of Michigan, with instructions to continue the injunctive relief previously granted by that court and for further proceedings on petitioner's claim for monetary damages, based on 42 U.S.C. §1983, and for attorney fees under 42 U.S.C. §1988.

Respectfully submitted

ALLAN FALK (P13278)
Counsel of Record
ALLAN FALK, P.C.
2010 Cimarron Dr.
Okemos, MI 48864-3908
(517) 381-8449

CY WEINER & ELIZABETH THOMSON
WEINER & COX, P.C.
Counsel for Petitioner
3000 Town Center, Ste 1800
Southfield, MI 48075
(248) 351-2200

No. _____

In the
Supreme Court of the United States

DANIEL A. SCHMITT,
Petitioner

v.

CITY OF DETROIT, LORETTA NEAL, MARK VANN, JAMES FLORKOWSKI, BRYANT JENKINS, AND T. W. GRAPHICS,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX IN SUPPORT OF

PETITION FOR WRIT OF CERTIORARI

ALLAN FALK (P13278)
Counsel of Record
ALLAN FALK, P.C.
2010 CIMARRON DRIVE
OKEMOS, MI 48864-3908
(517) 381-8449

CY WEINER
ELIZABETH THOMSON
WEINER & COX, P.C.
Counsel for Petitioner
3000 TOWN CENTER, SUITE 1800
SOUTHFIELD, MI 48075
(248) 351-2200

LIST OF APPENDICES

APPENDIX A

United States Court of Appeals,
Sixth Circuit.

Daniel A. SCHMITT, Plaintiff-Appellant,
v.
THE CITY OF DETROIT, a Michigan municipal corporation; Loretta Neal, Former Income Tax Director of the City of Detroit; Mark Vann, Former Assistant Income Tax Director of the City of Detroit; James Florkowski, Manager I of the City of Detroit; Bryant Jenkins, Principal Accountant of the City of Detroit; and T.W. Graphics, Defendants-Appellees.
No. 03-1884.
Argued: Nov. 30, 2004.
Decided and Filed: Jan. 14, 2005.

Background: Taxpayer sued city, alleging that its personal income tax collection practices violated federal Privacy Act. The United States District Court for the Eastern District of Michigan, Anna Diggs Taylor, J., 267 F.Supp.2d 718, dismissed. Taxpayer appealed.

Holding: The Court of Appeals, Norris, Circuit Judge, held that city could not be liable under Privacy Act provision, requiring government agency requesting an individual's social security number to inform the individual whether the disclosure of the social security number was mandatory or voluntary, and for what purpose agency intended to use the number.

Affirmed in part, reversed in part, and remanded.

Appeal from the United States District Court for the Eastern

APPENDIX A

District of Michigan at Detroit. No. 02-74719--Anna Diggs Taylor, District Judge.

John C. Signorino, Weiner & Cox, P.L.C., Southfield, Michigan, for Appellant.

Linda D. Fegins, City of Detroit Law Department, Detroit, Michigan, for Appellees.

Elizabeth C. Thomson, Weiner & Cox, P.L.C., Southfield, Michigan, for Appellant.

Before: NORRIS and COOK, Circuit Judges; BECKWITH, Chief District Judge. [FN*]

OPINION

NORRIS, Circuit J.

Plaintiff Daniel Schmitt received a mailing from the City of Detroit concerning his 2001 income tax obligation. The vendor hired by the City to print these mailings included the recipient's social security number on the envelope. Plaintiff filed suit against the City under § 7(b) of Privacy Act of 1974 ("the Privacy Act"), Pub.L. 93-579, 88 Stat. 1896, on behalf of himself and other similarly situated individuals. [FN1] After the City agreed to include disclosure notices in future requests for social security numbers, the district court granted declaratory relief under the Privacy Act and dismissed all remaining claims pursuant to Fed.R.Civ.P. 12(b)(6). On appeal, plaintiff contends that he is entitled to money damages, attorney's fees, and costs. Because we hold that the Privacy Act applies solely to federal agencies, plaintiff failed to state a federal claim and, as a consequence, his complaint should have been dismissed *in toto*.

As do the federal government and the State of Michigan, the

APPENDIX A

City relies on a person's social security number for tax identification purposes, as permitted by the Internal Revenue Code, 26 U.S.C. § 6109(d) ("The social security account number issued to an individual for purposes of section 205(c)(2)(A) of the Social Security Act shall, except as shall otherwise be specified under regulations of the Secretary, be used as the identifying number for such individual for purposes of this title."). In 2001, the City contracted with T.W. Graphics to print, address, pre-sort, and deliver income tax forms for mailing. The mailing label included the taxpayer's social security number. When this mistake came to light, Mayor Kwame Kilpatrick wrote a letter of apology to the aggrieved taxpayers, promising to "take the necessary steps to prevent such an unwelcome event in the future."

Plaintiff's initial complaint was filed on November 26, 2002, ten months after the mayor's apology. The complaint was amended the following January. Section 7(b) of the Privacy Act, which is the claim at the heart of this appeal, provides as follows:

> Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

Pub.L. 93-579, 88 Stat.1909, 5 U.S.C. § 552a (2004) (note).

Throughout this litigation, plaintiff has relied upon this provision for the proposition that local governmental entities, such as the income tax division of the City, are subject to the Privacy Act. However, the language of § 7(b) suggesting that state and local agencies fall within its ambit is at odds with another crucial definition of the Privacy Act,

as codified at 5 U.S.C. § 552a. Specifically, the Privacy Act defines the term "agency" with reference to the Freedom of Information Act ("FOIA"). See 5 U.S.C. § 552a(a)(1) (referencing FOIA definition of agency found at 5 U.S.C. § 552(e), subsequently re-designated at § 552(f)). Section 552(f) provides " 'agency' as defined in section 551(1) of this title includes an executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency ...." 5 U.S.C. § 552(f)(1). Section 551(1) of Title 5, in turn, defines "agency" as "each authority of the Government of the United States ...." In short, the Privacy Act, albeit by reference, unambiguously defines the term "agency" as an agency of the federal government.

The district court looked to these statutory definitions and held that "[t]he City is not an agency under any statutory definition" and therefore is "not properly subject to the requirements of § 7(b) of the Privacy Act." *Schmitt v. City of Detroit*, 267 F.Supp.2d 718, 722 (E.D.Mich.2003). Other courts have likewise concluded that the Act applies only to federal agencies. *See Polchowski v. Gorris*, 714 F.2d 749, 752 (7th Cir.1983) ("the bill, as originally introduced, contained a remedy for improper disclosures by state authorities; these provisions were deleted, however, because of the uncertain effect of such a provision and because Congress felt that it lacked the necessary information for devising a remedial scheme in this context") (citing 1974 U.S.Code Cong. & Adm. News at 6933-34) (footnote omitted); *Stoianoff v. Comm'r of Motor Vehicles*, 107 F.Supp.2d 439, 442 (S.D.N.Y.2000) (observing that § 7(b) was "never codified"); *see also* J.M. Zittler, Annotation, *What is Agency Subject to Privacy Act Provisions*, 150 A.L.R. Fed. 521, 530 (1998) ("The statutory definition of 'agency' would appear to be referring to federal agencies only") (collecting

cases); *but see Greater Cleveland Welfare Rights Org. v. Bauer*, 462 F.Supp. 1313, 1319-20 (N.D.Ohio 1978) (inferring a right of action for prospective relief under § 7(b) against a county welfare department).

Despite the importance of this issue to the resolution of the appeal, in their briefs to this court, neither party focused upon the interplay between § 7(b) of Pub.L. 93-579 and the codified definition of agency found at 5 U.S.C. § 552a(a)(1). Rather, plaintiff simply assumed that § 7(b) controls while the City focused on the codified statute rather than upon the public law. That being the case, we start with basic principles. First, it is the Statutes at Large that "shall be legal evidence of laws." 1 U.S.C. § 112. By contrast, the United States Code shall "establish prima facie the laws of the United States." 1 U.S.C. § 204(a). Thus, even if a portion of Pub.L. 96- 579, which appears in the Statutes at Large at 80 Stat. 1896, were omitted from the United States Code, it would retain the force of law. *United States Nat. Bank of Oregon v. Indep. Ins. Agents of America, Inc.*, 508 U.S. 439, 448, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993); *see generally* Abner J. Mikva & Eric Lane, *Legislative Process*, 89-92 (Aspen Law & Business 2d ed.2002). However, that general principle gives way when a title of the United States Code has been enacted into positive law by Congress; when that happens, "the text thereof shall be legal evidence of the laws therein contained." 1 U.S.C. § 204(a); *National Bank of Oregon*, 508 U.S. at 448 n. 3. Congress enacted Title 5 as positive law in 1966. Pub.L. 89-554, 80 Stat. 378.

Given that Title 5 has the force of positive law, the viability of § 7(b) is premised upon whether it was codified. It was, albeit as a note to 5 U.S.C. § 552a. *See* 5 U.S.C. § 552a (Congressional Findings and Statement of Purpose). We are therefore confronted by two provisions of the Privacy Act that contradict one another to some degree: the statutory definition, which unambiguously contemplates that the

Privacy Act applies exclusively to federal agencies, and § 7(b), which by its terms includes state and local agencies within its ambit.

When faced with statutory sections that are inherently inconsistent, our first duty is to reconcile the competing provisions so that they can both remain in effect. *See Daniel v. Cantrell*, 375 F.3d 377, 383 (6th Cir.2004); *petition for cert. filed* (U.S. Oct. 4, 2004) (No. 04-6822); *Anderson v. Yungkau*, 153 F.2d 685, 688 (6th Cir.1946) (dissent); *see generally* Singer, Norman, J. *Statutes and Statutory Construction* § 28:12 (West Group 6th ed.2002). In this case, however, such a reconciliation is impossible. The statutory definition of an agency found at § 552a(a)(1) contains no language to indicate that it does not apply to the Privacy Act as a whole. Were we to hold that § 7(b) applies to state and local agencies, we would effectively say that an unambiguous definition of a core term, which itself was promulgated by Congress, Pub.L. 93-579 § 3, 88 Stat. 1897, applies only part of the time. This we will not do.

While we are hesitant to rely upon legislative history, [FN2] in this instance it overwhelmingly supports the view that the Privacy Act applies exclusively to federal agencies. Not only was § 7(b) of Pub.L. 93-579 included in the notes to 5 U.S.C. § 552a, so too was § 2, the "Congressional Findings and Statement of Purpose," which contains the following finding: "[T]he privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by *Federal* agencies." Pub.L. 93-579, § 2(a)(1), 88 Stat. 1896 (emphasis added). In the same vein, Congress stated, "The purpose of this Act ... is to provide certain safeguards for an individual against an invasion of personal privacy by requiring *Federal* agencies ... to [*inter alia*] ... be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act." Pub.L. 93-579 § 2(b)

(emphasis added). Furthermore, Senate Report 93-1183, which is dated September 26, 1974, contains the following discussion of the Privacy Act's application to entities beyond the federal government:

> COVERAGE: PRIVATE, STATE AND LOCAL
>
> As reported, the bill applies to Federal personal information systems, whether automated or manual, and to those of State, local and private organizations which are specifically created or substantially altered through grant, contract or agreement with Federal agencies, where the agency causes provisions of the act to be applied to such systems or files or relevant portions.
>
> As introduced, S. 3418 applied to all governmental and private organizations which maintained a personal information system, under supervision of a strong regulatory body, with provision for delegating power to State instrumentalities.
>
> The Committee has cut back on the bill's original coverage and ordered the Privacy Commission to make a study of State, local and private data banks and recommend precise application of the Act where needed.

1974 U.S.C.C.A.N. 6916, *6932 -6933. At least one court has cited Senate Report 93-1183 in holding that the Privacy Act applies only to federal agencies. *Polchowski*, 714 F.2d at 752. If nothing else, the report indicates that Congress considered a broader application of the statute but held off pending further study. Finally, plaintiff cites us to nothing in the legislative history of the statute that would indicate that Congress viewed the dissemination of social security

numbers differently than it did other records. *See* 1974 U.S.C.C.A.N. 6916, 6943-46 (discussing privacy concerns related to use of social security numbers but recognizing legitimate uses by entities other than the federal government and recommending further study by the Privacy Commission).

The fact that the Privacy Act contains a section that defines the term "agency" as including only those agencies that fall under [the] control [of] the federal government, coupled with a legislative history that supports such a reading of its scope, forces us to conclude that–notwithstanding the codification of § 7(b)–the Privacy Act applies exclusively to federal agencies. Because plaintiff cannot state a cause of action against the City, we hold that his suit was properly dismissed pursuant to Fed. R. Proc. 12(b)(6). To the extent that the district court granted declaratory relief under the Privacy Act, that portion of the court's order is reversed. The City may, for policy reasons, continue to include disclosure notices when requesting social security numbers, but it is not required to do so under the Privacy Act.

The judgment of the district court memorialized by its Order Granting Declaratory Relief is reversed to the extent that it grants declaratory relief under the Privacy Act and affirmed in all other respects. The cause is remanded to the district court with instructions to dismiss the complaint for failure to state a claim.

FN* The Honorable Sandra S. Beckwith, Chief United States District Judge for the Southern District of Ohio, sitting by designation.

FN1. Plaintiff also sued former City income tax division employees, Loretta Neal and Mark Vann; Bryant Jenkins, the City's principal accountant; James Florkowski, a City

manager; and T.W. Graphics, the vendor who produced the offending mailings. The amended class action complaint included state law negligence, emotional distress and invasion of privacy claims. The district court declined to exercise supplemental jurisdiction over plaintiff's state law claims and dismissed them without prejudice. They are not before us on appeal.

FN2. As Justice Jackson famously put it, "Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared ." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395, 71 S.Ct. 745, 95 L.Ed. 1035 (1951) (concurrence). Justice Scalia has taken this skepticism about legislative history one step further, "The[ ] only mistake was failing to recognize how unreliable Committee Reports are--not only as a genuine indicator of congressional intent but as a safe predictor of judicial construction. We use them when it is convenient, and ignore them when it is not." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 617, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991) (concurrence).

C.A.6 (Mich.),2005.
Schmitt v. City of Detroit

2005 WL 77159 (6th Cir.(Mich.)), 2005 Fed.App. 0023P

END OF DOCUMENT

APPENDIX B

No. 03-1884

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
AUG 1 0 2005
LEONARD GREEN, Clerk

DANIEL A. SCHMITT,

Plaintiff-Appellant,

v.

THE CITY OF DETROIT, A Michigan Municipal Corporation, ET AL.

Defendants-Appellees

ORDER

BEFORE: NORRIS and COOK, Circuit Judges, and BECKWITH*, District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green. Clerk

*Hon. Sandra S. Beckwith, Chief United States District Judge for the Southern District of Ohio, sitting by designation.

APPENDIX C

267 F.Supp.2d 718

United States District Court,
E.D. Michigan,
Southern Division.

Daniel A. SCHMITT, Plaintiff,
v.
CITY OF DETROIT, Loretta Neal, Mark Vann, James Florkowski, Bryant Jenkins, and T.W. Graphics, Defendants.

No. CIV. 02-74719.

June 12, 2003.

Taxpayer sued city, alleging that its personal income tax collection practices violated federal Privacy Act. On city's motion to dismiss, the District Court, Anna Diggs Taylor, J., held that: (1) taxpayer had no implied private right of action to enforce Privacy Act against city, and (2) attorney fees and costs were not recoverable.

Motion granted.

West Headnotes

[1] KeyCite Notes

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory Rights of Action. Most Cited Cases

Whether statute is enforceable under implied right of action theory requires determination as to whether or not Congress intended to confer individual rights upon class of beneficiaries.

APPENDIX C

[2] KeyCite Notes

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory Rights of Action. Most Cited Cases

Legislative intent is determinative factor in discerning whether implied private right of action exists to enforce statute.

[3] KeyCite Notes

13 Action
13I Grounds and Conditions Precedent
13k13 k. Persons Entitled to Sue. Most Cited Cases

Private right of action for individuals to enforce Privacy Act's notice requirements is limited to actions against federal agencies. 5 U.S.C.A. § 552a(e), (g)(1)(D).

[4] KeyCite Notes

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory Rights of Action. Most Cited Cases

Although Privacy Act affords private right of action to enforce its provisions, it does not provide private remedy against municipal corporation, or any other state actor for that matter. 5 U.S.C.A. § 552a.

[5] KeyCite Notes

326 Records
326II Public Access
326II(A) In General

326k31 k. Regulations Limiting Access; Offenses. Most Cited Cases

To prevail on Privacy Act notice claim, plaintiff must establish that: (1) agency failed to notify him of purpose for requesting information in question; (2) agency's actions had adverse effect on plaintiff; and (3) agency willfully or intentionally violated notice requirement. 5 U.S.C.A. 552a(e)(3).

[6] KeyCite Notes

326 Records
326II Public Access
326II(A) In General
326k34 k. Proceedings for Access. Most Cited Cases

Taxpayer, who had obtained declaratory relief in suit against city to enforce Privacy Act notice requirements, was not entitled to recover attorney fees and costs under class benefit theory; no class certification had been sought, taxpayer, having admitted lack of injury, was not appropriate class representative, and case did not fit into narrow class of shareholder lawsuits in which fees were recoverable despite lack of economic benefit.

Cyril V. Weiner, Elizabeth C. Thomson, Weiner & Cox, P.L.C., Southfield, MI, for plaintiff.

James D. Noseda, City of Detroit Law Department, Detroit, MI, for defendant.

APPENDIX C

MEMORANDUM OPINION AND ORDER

ANNA DIGGS TAYLOR, District Judge.

I.

Before the court is the City of Detroit's ("the City") Motion to Dismiss. Fed.R.Civ.P. 12(b)(6). Plaintiff alleges that the City's personal income tax collection practices violated § 7(b) of the Privacy Act of 1974 (" § 7(b)"). 5 U.S.C. § 552a(e). At the first scheduled oral argument, Plaintiff stated that the City had raised new arguments in its Reply brief to which Plaintiff did not have an opportunity to respond on account of the court's briefing schedule. Plaintiff then requested leave to file a Supplemental Response brief. The court granted Plaintiff's request and also allowed the City to file a Supplemental Reply. On May 19, 2003, the court again heard oral argument on the City's motion. For the reasons explained below, the court GRANTS Defendant's Motion to Dismiss.

II.

The City imposes and collects income taxes from its residents as well as from non-residents who work in the City. The City requires taxpayers to provide their social security numbers on tax forms. In 2001, the City hired a contractor to print, address and otherwise prepare the 2001 City income tax forms for distribution to taxpayers who had filed a tax return the previous year. The contractor printed taxpayers' social security numbers on the mailing labels of certain tax forms. In January 2002, the City's Mayor, Kwame Kilpatrick, mailed a letter of apology to taxpayers for the mailing label mishap.

Plaintiff filed a five-count, class action complaint alleging that the City had violated § 7(b) of the Privacy Act. 5 U.S.C. § 552a(e). Plaintiff's complaint also included

allegations of negligence, invasion of privacy and emotional distress. Three Defendants originally filed this Motion to Dismiss: the City, James Florkowski and Bryant Jenkins, the City's Manager and Principal Accountant, respectively. At the first oral argument, Plaintiff agreed to dismiss the federal claims against all of the individual defendants noting that the Privacy Act does not provide for suits against private persons. 5 U.S.C. § 552a(e). This court then dismissed the individual defendants with prejudice and declined to exercise pendent jurisdiction over Plaintiff's state law claims, none of which were against the City. The only pending claim before this court is Plaintiff's allegation that the City violated § 7(b). 5 U.S.C. § 552a(e).

Specifically, Plaintiff claims that the City violated § 7(b) by failing to include a disclosure statement outlining the purpose for requesting taxpayers' social security numbers and the intended uses for that information.[FN1] 5 U.S.C. § 552a(e). The City contends that a 1976 amendment to the Social Security Act, 42 U.S.C. § 405(c)(2)(C)(i), partially repealed the Privacy Act of 1974, thereby allowing the City to require and use social security numbers in the administration of any tax law.[FN2] The City further contends that federal tax law dictates that social security numbers be used as a taxpayer's identification number. *See*, 26 U.S.C. § 6109(d).[FN3] At the first scheduled oral argument, the City, however, conceded that it intended to attach a disclosure statement to its tax forms in the future in order to comply with § 7(b). Plaintiff countered that he was seeking attorney fees and damages in addition to the prospective declaratory relief which the City had offered, hence the need for additional briefing and oral argument.[FN4] This memorandum constitutes the court's findings of fact and law concerning the application of § 7(b) of the Privacy Act of 1974 to the City's administration of its tax laws.

APPENDIX C

FN1. 5 U.S.C. § 552a(e)(3) states, in relevant part, that:

Each agency that maintains a system of records shall-

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual-
(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;
(B) the principal purpose or purposes for which the information is intended to be used;
(C) the routine uses which may be made of the information ···; and
(D) the effects on him, if any, of not providing all or any part of the requested information.

FN2. The Social Security Act states that:
It is the policy of the United States that any State (or political subdivision thereof) may, in the administration of any tax, ··· within its jurisdiction, utilize the social security account numbers issued by the Commissioner of Social Security for the purpose of establishing the identification of individuals affected by such law, and may require any individual who is or appears to be so affected to furnish to such State (or political subdivision thereof) or any agency thereof having administrative responsibility for the law involved, the social security account number (or numbers, if he has more than one such number) issued to him by the Commissioner of Social Security. 42 U.S.C. § 405(c)(2)(C)(i).

FN3. 26 U.S.C. § 6109(d) states, in relevant part, that:

The social security account number issued to an individual ··· shall, except as shall otherwise be specified under regulations of the Secretary, be used as the identifying number for such individual for purposes of this title.

FN4. Plaintiff's counsel stated that several cases, particularly *Ohlsen v. DST Indus.*, 314 N.W.2d 699, 111 Mich.App. 580 (1981), supported his position. Plaintiff failed, however, to discuss that case in his Supplemental Brief filed with this court. Incidentally, because the *Ohlsen* court held that the plaintiff had no private right of action to enforce a private employer's violation of the state's occupational safety statute, the *Ohlsen* case does not support Plaintiff's argument.

III.

Plaintiff maintains that § 7(b) affords an implied private right of action. Plaintiff asserts that if he is not entitled to seek the remedies available under the statute, then the provisions of the Privacy Act that apply to local agencies provide empty rights with no means of enforcement. Conversely, the City has argued that Plaintiff has no claim, implied or otherwise, under the Privacy Act, save a possible action for declaratory relief only, on the limited issue of whether the City's tax form must include a § 7(b) disclosure statement. Plaintiff's claims against the City present two issues: 1) whether or not there is an implied cause of action that would allow Plaintiff to privately enforce § 7(b), and 2) if Plaintiff does have an implied cause of action, whether or not plaintiff is entitled to an award of damages and attorney fees in addition to the prospective declaratory relief to which the City has stipulated.

A. Implied Private Cause of Action

Plaintiff avers that whether an individual has an implied cause of action depends on the following four factors: 1) whether Plaintiff belongs to the class for whose benefit the statute was enacted; 2) whether the legislature intended, explicitly or implicitly, to create an implied cause of action; 3) whether an implied cause of action is consistent with the underlying purpose of the legislative scheme; and,

4) whether the cause of action is one traditionally relegated to state law, such that it would be inappropriate to imply a cause of action based solely on federal law. *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). Defendant contends that courts must look to a statute's rights-creating language as well as look for a focus on individuals in a statute's text to determine whether Congress intended to create an implied private cause of action. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002).

1. Congressional Intent.

Whether a statute is enforceable under an implied right of action theory "require[s] a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries." *Gonzaga*, 536 U.S. at 285-86, 122 S.Ct. 2268, 153 L.Ed.2d 309. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 289, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). The Supreme Court's recent decisions are unequivocal. Legislative intent is the determinative factor "in discerning whether personal rights exist in the implied right of action context." *Gonzaga*, 536 U.S. at 285-86, 122 S.Ct. 2268, 153 L.Ed.2d 309; *see also, Sandoval*, 532 U.S. at 289, 121 S.Ct. 1511, 149 L.Ed.2d 517 (stating that Congress has the sole authority to create private causes of action); *Cline v. Rogers*, 87 F.3d 176, 182 (6th Cir.1996)(recognizing the Supreme Court's apparent modification of the *Cort* analysis).

Next, the court turns to an examination of congressional intent in drafting the Privacy Act's enforcement provisions. 5 U.S.C. § 552a(g). The Privacy Act states that

> Whenever any agency fails to comply with any ··· provision of this section, ··· in such a way as to have an

> adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection. 5 U.S.C. § 552a(g)(1)(D).

Thus, the Privacy Act's language leaves no doubt as to the drafters' intent. Congress explicitly authorizes individual causes of action for failure to comply with § 7(b)'s notice requirements. 5 U.S.C. § 552a(e).

2. Available Remedies.

The inquiry, however, does not end with the determination that Congress intended to allow private causes of action to enforce the federal law in question. The Supreme Court has instructed that "[e]ven where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent to create not just a private right but also a private remedy." *Sandoval*, 532 U.S. at 286, 121 S.Ct. 1511, 149 L.Ed.2d 517 (citations omitted). Without a private remedy, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* Therefore, in order to determine if a private right of action can be implied in Plaintiff's favor, this court must also consider the remedies available under the statute. *Id.* The Privacy Act's civil remedies provision, as noted above, states that an individual may bring a civil action against an agency. 5 U.S.C. § 552a(g)(1). The term "agency," borrowed from the Freedom of Information Act, [I]ncludes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the

President), or any independent regulatory agency. 5 U.S.C. § 552(f).

The term "agency" is further clarified to mean "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." 5 U.S.C. § 551(1).

Congress has meticulously outlined the definition of "agency" as indicated by its explicit exclusion of several possible entities from that term. 5 U.S.C. § 551(1) (listing eight entities excluded from the term "agency," among them are Congress, the federal courts and the government of the District of Columbia); 5 U.S.C. § 552(f). Congress' attention to detail in drafting several pieces of legislation delineating what an agency is and what it is not indicates that if Congress intended to authorize private causes of action against municipalities, then it would have done so explicitly. The private cause of action which the Privacy Act affords is, thus, limited to causes of action against federal agencies. *See, e.g., Unt v. Aerospace Corp.*, 765 F.2d 1440, 1447 (9th Cir.1985) (citations omitted)("The private right of civil action created by the [Privacy] Act is specifically limited to actions against agencies of the United States Government").

The City is not an agency under any statutory definition. 5 U.S.C. § 551(1); 5 U.S.C. § 552(f). Although the Privacy Act affords a private right of action to enforce its provisions, the statute does not provide a private remedy against a municipal corporation, or any other state actor for that matter. *Sandoval*, 532 U.S. at 286, 121 S.Ct. 1511, 149 L.Ed.2d 517 (citations omitted). The court rejects Plaintiff's argument that unless an implied private cause of action exists for § 7(b), then the statute designed to protect the privacy of taxpayers' social security numbers is an empty provision. Consistency with the statute is not the test for whether a private cause of action can be implied, but rather

congressional intent is the relevant inquiry. *Id.* The court thus finds that the City is not properly subject to the requirements of § 7(b) of the Privacy Act and that it would be improper for this court to imply a private cause of action against the City. *Id.; Gonzaga,* 536 U.S. at 285-86, 122 S.Ct. 2268, 153 L.Ed.2d 309.

B. Damages

Plaintiff has also asserted that he is entitled to damages as specified in the Privacy Act which include a minimum award of $1,000.00 for each violation of § 7(b), in addition to attorney fees and costs. 5 U.S.C. 552a(g)(4). FN5 Alternatively, Plaintiff states that he is entitled to attorney fees and costs due to his successful procurement of declaratory relief on behalf of himself and other taxpayers who will benefit from the City's concession that it will add a disclosure statement to its future tax forms indicating the City's intended use of and purpose for requesting taxpayers' social security numbers. Although the court has already established that Plaintiff does not have an implied cause of action to enforce § 7(b), the court nevertheless addresses each of these arguments in turn in order to resolve Plaintiff's request for damages.

FN5. 5 U.S.C. 552a(g)(4) states, in relevant part, that:

(4) In any suit brought under the provisions of ··· this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of-

(A) actual damages sustained by the individual as a result of the refusal or failure, but in case shall a party entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

1. Damages Pursuant to the Privacy Act

In order to prevail on a claim arising under the Privacy Act, Plaintiff must establish that 1) the City failed to notify him of the purpose for requesting his social security number; 2) the City's actions had an adverse effect on Plaintiff; and, 3) the City willfully or intentionally violated § 7(b). 5 U.S.C. 552a(e)(3); *see also, Cardamone v. Cohen*, 241 F.3d 520, 525 (6th Cir.2001). It is undisputed that the City did not inform Plaintiff or any other taxpayer of the purpose for requesting social security numbers on tax forms. It is implausible that the City's actions adversely affected Plaintiff because he has admitted that the City did not harm him by requesting his social security number.[FN6] Further, the City has argued that its request for taxpayers' social security numbers is effectively mandated by the Internal Revenue Service's ("IRS") use of those numbers for taxpayer identification purposes, as well as on federal tax forms such as the W-2. 26 U.S.C. § 6109(d). Inasmuch as the City requests taxpayers social security numbers' for taxpayer identification purposes, and that such is the practice of the IRS and most local and state tax authorities, Plaintiff has also failed to show that the City acted intentionally or willfully. Therefore, even if he had an implied cause of action, Plaintiff has met neither the statutory criteria nor the Sixth Circuit test for entitlement to damages pursuant to the Privacy Act. 5 U.S.C. § 552a(e)(3); *Cardamone*, 241 F.3d at 525.

FN6. "Plaintiff ··· does not claim to have been denied of any right or privilege." Pl.'s Response Br. to Def.'s Mot. to Dismiss. p. 6.

2. Class Benefit Theory

Plaintiff relies on *Mills v. Electric Auto-Lite*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970), for the proposition

that he is entitled to attorney fees for securing prospective declaratory relief on behalf of others. This court finds that *Mills* is inapplicable authority for two reasons. 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593. First, the Plaintiff has neither moved for, nor has the court granted, certification of the class for whose benefit Plaintiff seeks relief for having to disclose their social security numbers. Having admitted that he suffered no harm as a result of the City's failure to provide a disclosure statement in accordance with § 7(b), Plaintiff would not be an appropriate class representative. *Courtney v. Smith*, 297 F.3d 455, 467 (6th Cir.2002) (citations omitted)(noting that as a prerequisite to class certification it must be established that the class representative has standing to pursue the claims as to which class-wide relief is sought). Even if an implied private right of action to enforce § 7(b) existed, which it does not, Plaintiff has no standing to pursue relief on behalf of the class. *Id.* Therefore, he should not be allowed to secure attorney fees for obtaining prospective declaratory relief on behalf of a class which he cannot appropriately represent. *Id.*

Second, the Court in *Mills* created a very narrow exception to the general rule that attorney fees cannot be awarded for seeking relief on behalf of a class absent securing a substantial economic benefit for that class. *Mills*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593. The Court found in that case that the absence of statutory authority did not preclude granting attorney fees in successful shareholder lawsuits wherein the plaintiffs obtained declaratory relief, because such lawsuits theoretically benefit the entire corporation. *Id.* Plaintiff is not seeking relief on behalf of shareholders or even on behalf of a certified class, nor has Plaintiff obtained relief from the court. Therefore, Plaintiff's request for attorney fees must be denied because it does not fit the very limited class benefit exception articulated in *Mills*. *Id.*

The court thus finds that 1) Plaintiff has no implied cause of action to enforce § 7(b), and 2) Plaintiff is not entitled to damages under the Privacy Act or pursuant to a class benefit theory because Plaintiff has no standing to sue and, therefore, is not an appropriate class representative. 5 U.S.C. § 552a(g).

IV.

The court having heard oral argument on May 19, 2003, and being otherwise fully advised on the premises; Now therefore,

IT IS ORDERED that Plaintiff is limited to the prospective declaratory relief outlined in the Order which was presented by the Defendant City and is attached to this Memorandum Opinion.

IT IS SO ORDERED.

ORDER GRANTING DECLARATORY RELIEF DISMISSING REMAINING FEDERAL LAW CLAIMS, AND DISMISSING STATE LAW CLAIMS WITHOUT PREJUDICE

This matter comes before the Court on motion under F.R. Civ. P. 12(b)(6) by defendants City of Detroit, James Florkowski and Bryant Jenkins for dismissal of the plaintiff's federal law claims under Section 7(b) of the Privacy Act of 1974. Plaintiff's counsel has agreed to dismiss the federal claim against all defendants other than the City of Detroit. The Court finds that there is no express nor implied cause of action for damages or other relief under the Privacy Act against a state actor other than for prospective declaratory relief. The City of Detroit has agreed to include a Privacy Act notice on City income tax forms. All federal law claims in this action having been resolved before discovery, it serves the interest of judicial economy, convenience, fairness and

comity to decline to exercise supplemental jurisdiction over plaintiff's state law tort claims.

Now, therefore, it is ordered:

1. The Court declares, under section 7(b) of the Privacy Act of 1974, that on and after the date of this order, the following statement or its reasonable equivalent be included with City of Detroit income tax return forms which request a social security account number:

> The disclosure of social security account number(s) on this tax return is mandatory. This solicitation and use of social security account numbers is authorized by federal law (42 USC § 405(c)(2)(C)(i)), Michigan law (MCL 141.642), and city of Detroit ordinance (1984 Detroit City Code § 18-10-11). The City of Detroit uses social security account numbers in the administration of its income tax law for the purpose of establishing taxpayer identification, to automate and unify its tax reporting and collection, and as otherwise needed for the administration of the City's income tax laws. Under 1984 Detroit City Code § 18-10-16, any information gained by the income tax administrator, city treasurer or other city official, agent or employee as a result of a tax return, investigation, hearing or verification required or authorized by the Uniform Income Tax Ordinance is confidential, except for official purposes in connection with the administration of the ordinance, and except in accordance with a proper judicial order.

2. Except for the above prospective declaratory relief, plaintiff fails to state a claim under federal law upon which relief can be granted and its federal law claim is dismissed. 3. Under 28 U.S.C. § 1367(c)(3), the Court declines to exercise

supplemental jurisdiction over plaintiff's state law claims and those claims are dismissed without prejudice.

4. There are no other pending claims and this order closes the case.

E.D.Mich.,2003.
Schmitt v. City of Detroit
267 F.Supp.2d 718

APPENDIX D

TEXT OF STATUTORY PROVISIONS INVOLVED PER SUPREME COURT RULE 14.1(f)

This case involves the construction and application of §7(b) of the Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896, 1909, 5 U.S.C. §552a (2004)(note), in connection with the definition of "agency" in 5 U.S.C. §552(f), as well as 42 U.S.C. §§1983 and 1988. The text of these statutes is as follows:

Section 7(b) of the Privacy Act, Pub.L. 93-579, 88 Stat.1909, 5 U.S.C. § 552a (2004) (note)[1], provides as follows:

> Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

5 U.S.C. § 552a(a)(1), which is part of the Privacy Act, provides:

> **a) Definitions.**--For purposes of this section--
> **(1)** the term "agency" means agency as defined in section 552(e) of this title;
> * * *

5 U.S.C. § 552(f) provides:

(f) For purposes of this section, the term--

---

[1] Section 7(b) is not part of the United States Code but it is part of the Statutes at Large, 88 Stat. 1909, and therefore fully effective per 1 U.S.C. §112 (declaring that the Statutes at Large "shall be legal evidence of laws." The fact that §7(b) is not codified with other parts of the Privacy Act, e.g., 5 U.S.C. §552a, is of crucial importance here, because the limiting definition of "agency" in 5 U.S.C. §552(f) applies only to §552a and not to §7(b).

APPENDIX D

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency;
* * *

28 U.S.C. §1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

42 U.S.C. §1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX D

42 U.S.C. §1988 provides:

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United

States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

APPENDIX E

United States Court of Appeals,
Eleventh Circuit.

Deborah SCHWIER, Theodore Schwier, et al., Plaintiffs-Appellants,

v.

Cathy COX, in her official capacity as Secretary of State of Georgia,

Defendant-Appellee,

United States of America, Intervenor.

No. 02-13214.

Aug. 11, 2003.

340 F.3d 1284 (11th Cir., 2003)

Unsuccessful voter registrants filed suit against Secretary of the State of Georgia, seeking declaratory and injunctive relief under § 1983 based on claims that Georgia's voter registration procedure and voter registration form violated Privacy Act and Voting Rights Act. The United States District Court for the Northern District of Georgia, No. 00-02820-CV-JEC-1, Julie E. Carnes, J., found that plaintiffs could not bring a private right of action under § 1983, and they appealed. The Court of Appeals, Dubina, Circuit Judge, held that: (1) rights conferred by section of Privacy Act barring agencies from denying any right because of individual's refusal to disclose his social security account number could be enforced by a private right of action under § 1983, and (2) Voting Rights Act provision forbidding the practice of disqualifying potential voters for their failure to provide information irrelevant to determining their eligibility to vote could be enforced by a private right of action under § 1983.

Reversed and remanded.

APPENDIX E

Voting Rights Act provision forbidding the practice of disqualifying potential voters for their failure to provide information irrelevant to determining their eligibility to vote could be enforced by a private right of action under § 1983; neither Voting Rights Act's provision for enforcement by the Attorney General nor Congress's failure to provide for a private right of action expressly in Voting Rights Act required the conclusion that Congress did not intend such a right to exist. 42 U.S.C.A. § 1971(a)(2)(B); 42 U.S.C.A. § 1983.

Neil Bradley, ACLU, Atlanta, GA, for Plaintiffs-Appellants. Kendall L. Kerew, Kathryn L. Allen, Georgia Dept. of Law, Atlanta, GA, for Defendant-Appellee. Michael S. Raab, Catherine Y. Hancock, U.S. Dept. of Justice, Civ. Div., Appellate Staff, Washington, DC, for Intervenor.

Appeal from the United States District Court for the Northern District of Georgia.

Before DUBINA and BLACK, Circuit Judges, and RYSKAMP [FN*], District Judge.

> FN* Honorable Kenneth L. Ryskamp, United States District Judge for the Southern District of Florida, sitting by designation.

DUBINA, Circuit Judge:

Deborah Schwier, Theodore Schwier, and Michael Craig (collectively, "Appellants") filed suit in federal district court against Cathy Cox ("Cox"), in her official capacity as Secretary of the State of Georgia, seeking declaratory and injunctive relief under 42 U.S.C. § 1983. The Appellants claimed that Georgia's voter *1286 registration procedure and Voter Registration Form violated section 7 of the Privacy Act of 1974, Pub.L. 93- 579, 88 Stat. 1896, 2194, 5 U.S.C. 552a (note), and section 1971 of the Voting Rights Act of 1870, 42 U.S.C. § 1971(a)(2)(B). The district court found that

APPENDIX E

Appellants could not bring a private right of action under § 1983 for violations of section 7 of the Privacy Act or section 1971 of the Voting Rights Act. For the reasons that follow, we reverse.

I. *BACKGROUND*

Prior to the general election of November, 2000, Deborah and Theodore Schwier ("the Schwiers") attempted to register to vote in Walton County, Georgia. The Schwiers submitted their registration applications without supplying their social security numbers ("SSNs"). Subsequently, Walton County officials notified the Schwiers that, unless they supplied officials with their SSNs, their voter registrations would be rejected. Michael Craig ("Craig") was unable to vote in Gwinnett County, Georgia because he also refused to supply officials with his SSN. The Schwiers [FN1] sought and won a preliminary injunction allowing them to vote in the election without providing their SSNs in the customary manner. [FN2] Discovery focused primarily on how Georgia implemented its voter registration statute, O.C.G.A. § 21-2-219.

> FN1. Craig joined the suit later.
> FN2. The injunction required the Schwiers to file their SSNs under seal with the court and also with election officials, who would hold the numbers without entering them into the system. If the Schwiers prevailed on the merits, the election officials would be required to destroy their record of the Schwiers' SSNs, but if Cox prevailed, the election officials would be allowed to enter the Schwiers' SSNs into the system.

After discovery, Appellants and Cox filed cross motions for summary judgment. The district court granted

Cox's motion for summary judgment on both the Privacy Act and Voting Rights Act claims. Appellants then perfected this appeal.

Appellants claim that Georgia's requirement that they provide their SSNs in order to vote and Georgia's Voter Registration Form ("the Form") violate the Privacy Act. Appellants argue that section 7 of the Privacy Act contains no remedial scheme and that Appellants may sue Cox for violations of section 7 via § 1983.

Cox argues that the Appellants do not have a private right of action under the Privacy Act. Alternatively, Cox argues that Georgia's voting statute is protected from the prohibitions of the Privacy Act by the Act's "grandfather" provision. Cox further argues that if Appellants may sue state officials for violations of the Privacy Act via § 1983, then passage of the Privacy Act exceeded Congress's authority, and the Privacy Act is unconstitutional. Because Cox argues that if section 7 of the Privacy Act is enforceable via a private right of action brought under § 1983, then section 7 of the Privacy Act is unconstitutional, the United States ("the Government") intervened as a matter of right pursuant to 28 U.S.C. § 2403(a) and Rule 44 of the Federal Rules of Appellate Procedure. The Government argues that the Privacy Act may be enforced under § 1983 and that Congress did not exceed its authority in passing the Privacy Act.

Appellants also contend that Georgia's requirement that voters supply their SSNs in order to vote violates 42 U.S.C. § 1971(a)(2)(B) of the Voting Rights Act, which prohibits states from disqualifying potential voters based on their failure to provide information not relevant to determining their eligibility to vote. Appellants argue that since its enactment in 1871, § 1983 has been available to private citizens to enforce the Voting Rights Act. They

contend that when Congress gave the Attorney General the authority to enforce the Voting Rights Act through the enactment of the Civil Rights Act of 1957, Congress *added* a means of enforcing the Voting Rights Act but did not take away the previously existing remedy of private suits via § 1983.

Cox argues that section 1971 of the Voting Rights Act may be enforced only by the Attorney General. In the alternative, Cox argues that, even if § 1971 may be enforced by a private right of action under § 1983, Appellants' claim is moot because Georgia has modified its Voter Registration Form.

II. *ISSUES*

1. Whether the district court erred in holding that section 7 of the Privacy Act does not allow for enforcement by a private right of action against state agencies by a suit under § 1983.
2. If the Privacy Act allows for a private right of action, whether Congress exceeded its authority in enacting the Privacy Act, rendering the Privacy Act unconstitutional.
3. Whether Georgia qualifies for the "grandfather" exception of section 7(a)(2)(B) of the Privacy Act.
4. Whether Georgia's Voter Registration Form complies with the notice requirements of section 7(b) of the Privacy Act.
5. Whether the district court erred in holding that section 1971 of the Voting Rights Act may not be enforced by a private right of action under § 1983.
6. Whether the disclosure of a person's SSN is "material" in determining whether he or she is qualified to vote under Georgia law for purposes of section 1971 of the Voting Rights Act.

III. *STANDARD OF REVIEW*

APPENDIX E

This court reviews "the district court's grant of summary judgment *de novo*.
Summary judgment is appropriate where there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." *Hale v. Tallapoosa County*, 50 F.3d 1579, 1581 (11th Cir.1995) (internal quotations and citation omitted).

IV. *DISCUSSION*

A. *Whether the district court erred in holding that section 7 of the Privacy Act does not allow for enforcement by a private right of action against state agencies by a suit under § 1983.*

The Privacy Act of 1974 contains only two substantive sections, section 3 and section 7. *See* 88 Stat. at 2177-94. Section 3 of the Privacy Act *applies only to federal agencies* and, among other things, delineates an individual's right to records of federal agencies and right to be protected from disclosure of records by federal agencies. Section 3 contains a comprehensive remedial scheme which includes the right to bring a civil action against a federal agency; however, the remedial scheme of section 3 states that it applies *only* to section 3.

Section 7 of the Privacy Act bars federal, *state*, or local agencies from denying "any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number" to the agency. [FN3] Section 7 of the Privacy Act does not contain its own remedial scheme and is explicitly excluded from the remedial scheme of section 3; thus, section 7 has *no* remedial scheme.

FN3. The entire text of section 7 of the Privacy Act states:

APPENDIX E

(a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) The provisions of paragraph (1) of this subsection shall not apply with respect to--

(A) any disclosure which is required by Federal statute, or
(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

88 Stat. at 2194.

1. *The district court's finding that section 7 of the Privacy Act is a "dead letter."*

Within the Privacy Act itself, Congress stated that section 3 was an amendment to Title V, which governs federal administrative agencies. *See* 88 Stat. at 2178. Thus, section 3 added a new section to Title V and was codified as

5 U.S.C. § 552a. *Id.* at 2177. Because Congress made no such statement about section 7 of the Privacy Act, the revisor of the U.S.Code placed section 7 in an "Historical and Statutory" note following 5 U.S.C. § 552a. *See* 5 U.S.C. § 552a (note). The district court mistakenly placed great weight on this fact. The district court noted that, although section 7 was part of the Privacy Act that "was passed into law as Public Law 93-579," the fact that section 7 "was never codified, and appears only in the 'Historical and Statutory Notes' section of the United States Code," made section 7 a mere "historical footnote to the Privacy Act of 1974 [which] Congress has never reflected any intention of [codifying]." The district court apparently believed that public laws have less "weight" as laws than laws which have been codified. The reverse is true: "the Code cannot prevail over the Statutes at Large when the two are inconsistent." *United States v. Welden*, 377 U.S. 95, 98 n. 4, 84 S.Ct. 1082, 1085 n. 4, 12 L.Ed.2d 152 (1964) (internal quotations omitted).

The district court also stated that section 7 was deleted from the Privacy Act by the Senate Government Operations Committee "before the law was codified into the official code." The district court quotes Senate Report 1183, but the quote demonstrates that the provision that was deleted from the Act pertained only to a business entity's refusal to enter into a "business transaction or commercial relationship with an individual because of [his] refusal to disclose or furnish [his social security] number." S. Rep. No. 93-1183 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6943. Thus, the court's conclusion that section 7 of the Privacy Act had been deleted was error. The best proof of this is section 7's presence in the Statutes at Large. *See* 88 Stat. at 2194; *see also Welden*, 377 U.S. at 98 n. 4, 84 S.Ct. at 1085 n. 4. We therefore conclude that the district court erred in finding that section 7 of the Privacy Act was "a dead letter."

2. *The district court's finding that the remedial scheme of section 3 forecloses a private action for violations of section 7.*

APPENDIX E

In finding that section 7 does not provide for a private right of action, the district court relied on the Ninth Circuit's holding in *Dittman v. California*, 191 F.3d 1020 (9th Cir.1999), that " '[t]he civil remedy provisions of *the statute* do not apply against private individuals, *state agencies*, private entities, or state and local officials.' " 191 F.3d at 1026 (quoting *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1447 (9th Cir.1985) (first emphasis added)).

In *Dittman*, the Ninth Circuit relied on two cases which involved only section 3 of the Privacy Act. Thus, when the Ninth Circuit quoted *Unt v. Aerospace Corp.* above, the phrase, "the statute," referred to section 3 of the Privacy Act, *not* section 7. *Unt's* holding had no relevance to the facts of *Dittman* or to the present case because in *Unt*, the plaintiff was trying to sue a non-government entity for violations of section 3 of the Privacy Act, which pertains only to federal agencies. *Unt*, 765 F.2d at 1447.

In addition, *Dittman* relied on the Seventh Circuit's holding in *Polchowski v. Gorris*, 714 F.2d 749 (7th Cir.1983). *Polchowski* also had no relevance to the facts of *Dittman* because, again, *Polchowski* involved enforcement of section 3 of the Privacy Act, rather than section 7. In *Polchowski*, the plaintiff sought to sue a state agency under § 1983 for releasing criminal information about him. 714 F.2d at 750. The release of the information would have violated section 3 of the Privacy Act, but section 3 applies only to federal agencies. Thus, the court reasoned, "Congress, by limiting the scope [of section 3 to federal agencies] has provided unequivocal and persuasive evidence that it intended to foreclose private enforcement of [section 3] against state or local officials who make unwarranted disclosures of statistical information." *Id.* at 752 (internal quotations omitted). In other words, the rights created by section 3 of the Privacy Act do not restrict the activities of *state* agencies.

In *St. Michael's Convalescent Hospital. v. California*, 643 F.2d 1369, 1373 (9th Cir.1981), on which *Dittman* also relied, the plaintiffs sought to sue a state agency under section 3 of

the Privacy Act. As in *Polchowski*, the plaintiffs sought to sue a *state* agency for violating a section of the Privacy Act which applies only to *federal* agencies. Thus, the Ninth Circuit dismissed plaintiffs' claims. *St. Michael's*, 643 F.2d at 1372.

In summary, *Unt*, *Polchowski*, and *St. Michael's*, all relied upon by the Ninth Circuit in *Dittman*, were distinguishable from *Dittman* and did not support the Ninth Circuit's holding in that case. *Dittman* failed to recognize that the remedial scheme of section 3 applies only to section 3 and has no bearing on section 7. Thus, the remedial scheme of section 3 provides no basis for concluding that Congress intended to preclude private remedies under § 1983 for violations of section 7. Therefore, we conclude that the district court erred in finding that the remedial scheme of section 3 of the Privacy Act precluded a private right of action via § 1983 for violations of section 7 of the Privacy Act.

3. *The district court's finding that the Tax Reform Act of 1976 limited the scope of the Privacy Act.*

The district court also found that the Tax Reform Act of 1976, which amended the Social Security Act, authorized the states to use SSNs for voting. The court's finding was due in large part to its reliance on *Stoianoff v. Commissioner of Motor Vehicles*, 107 F.Supp.2d 439, 442 (S.D.N.Y.2000), *aff'd*, 12 Fed.Appx. 33 (2nd Cir.2001). However, *Stoianoff* and the district court mistakenly relied on Committee language which was much broader than the very narrow language of the final version of the Tax Reform Act passed into law. *See Stoianoff*, 107 F.Supp.2d at 442. The final version authorizes States to use SSNs only "in the administration of any tax, general public assistance, driver's license, or motor vehicle registration." 42 U.S.C. § 405(c)(2)(C)(i) (2003). Thus, the district court erred in concluding that the scope of the Privacy Act had been limited by the Tax Reform Act.

4. *The Privacy Act and §1983.*

In *Gonzaga University v. Doe*, 536 U.S. 273, 283-84, 122 S.Ct. 2268, 2276, 153 L.Ed.2d 309 (2002), the Supreme Court

noted that the inquiry into whether a statute contains an implied right of action and the inquiry into whether the statute creates rights enforceable under § 1983 "overlap" in that both inquiries must begin with the question of whether "Congress *intended to create a federal right.*" 536 U.S. at 283, 122 S.Ct. at 2275. Here, we ask only whether the Privacy Act creates rights enforceable under § 1983 because this is the issue Appellants raise on appeal.

Section 1983 provides a private right of action whenever an individual has been deprived of any constitutional or statutory federal right under color of state law. *See* 42 U.S.C. § 1983; *see also Maine v. Thiboutot*, 448 U.S. 1, 4, 100 S.Ct. 2502, 2504, 65 L.Ed.2d 555 (1980). In *Blessing v. Freestone*, 520 U.S. 329, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997), the Supreme Court noted that they had "traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right":

First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

520 U.S. at 340-41, 117 S.Ct. at 1359 (internal citations and quotations omitted). [FN4] However, in *Gonzaga*, the Court pointed out that some courts had misunderstood the first factor of *Blessing* to permit a conferred *"benefit"* rather than "anything short of an unambiguously conferred *right* to support a cause of action brought under § 1983[,] ... [which] provides a remedy only for the deprivation of 'rights, privileges, or immunities secured by the Constitution and laws' of the United States." 536 U.S. at 282-83, 122 S.Ct. at 2275 (emphasis added).

> FN4. In *Blessing*, the Supreme Court found that Title IV-D could not be enforced by individuals under § 1983. The Court noted that Title IV-D's "requirement that a State operate its child support program in 'substantial compliance' with Title IV-D" was a "yardstick for the Secretary to measure the *systemwide* performance of a State's Title IV-D program" and thus did not confer a right or "*individual* entitlement to services" on "individual children and custodial parents." 520 U.S. at 343, 117 S.Ct. at 1361.

Thus, before we analyze the application of the *Blessing* factors to the Privacy Act, in keeping with *Gonzaga*, we must first ask whether Congress created an "unambiguously conferred right" in section 7 of the Privacy Act. 536 U.S. at 283, 122 S.Ct. at 2275; *see also Blessing*, 520 U.S. at 340, 117 S.Ct. at 1359 ("In order to seek redress through § 1983, ... a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*."). The relevant portion of section 7 states, "It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number." 88 Stat. at 2194. We agree with the Government that this language, aimed at the denial of rights to individuals, is analogous to language cited by the Supreme Court in *Gonzaga* as "explicit 'right-or duty-creating language' ".

Title VI provides:

> "*No person* in the United States *shall* ... be subjected to discrimination under any program or activity receiving Federal financial assistance" on the basis of race,

color, or national origin. 78 Stat. 252, 42 U.S.C. § 2000d (1994 ed.) (emphasis added).

Title IX provides:

> "*No person* in the United States *shall*, on the basis of sex ... be subjected to discrimination under any education program or activity receiving Federal financial assistance."

86 Stat. 373, 20 U.S.C. § 1681(a) (emphasis added). Where a statute does not include this sort of explicit "right- or duty-creating language" we rarely impute to Congress an intent to create a private right of action. 536 U.S. at 284 n. 3, 122 S.Ct. at 2276 n. 3. In contrast, the relevant language of the Family Educational Rights and Privacy Act of 1974 ("FERPA"), which the *Gonzaga* Court held not to create personal rights enforceable under § 1983 provides:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents to any individual, agency, or organization.

536 U.S. at 278-79, 122 S.Ct. at 2273 (quoting 20 U.S.C. § 1232g(b)(1)). The Court explained:

> Unlike the individually focused terminology of Titles VI and IX ("no person shall be subjected to discrimination"), FERPA's provisions speak only to the Secretary of Education, directing that "[n]o funds shall be made available" to any "educational agency or institution" which has a prohibited "policy

> or practice." 20 U.S.C. § 1232g(b)(1). This focus is two steps removed from the interests of individual students and parents and clearly does not confer the sort of "*individual* entitlement" that is enforceable under § 1983.

Id., 536 U.S. at 287, 122 S.Ct. at 2277 (quoting *Blessing*, 520 U.S. at 343, 117 S.Ct. at 1353).

> Admittedly, the language of section 7 falls somewhere in between the language of Titles VI and IX and that of FERPA. The subject of the relevant clauses of Titles VI and IX is "person," whereas the subject of the relevant clause of the Privacy Act is "it." In other words, if the Privacy Act were worded, "No individual may be denied any right, benefit, or privilege provided by law by any Federal, State or local government agency because of such individual's refusal to disclose his social security account number," the language would be more precisely analogous to that of Titles VI and IX. Nonetheless, the Privacy Act clearly confers a *legal right* on *individuals:* the right to refuse to disclose his or her SSN without suffering the loss "of any right, benefit, or privilege provided by law." 88 Stat. at 2194. Thus, we conclude that Congress created an "unambiguously conferred right" in section 7 of the Privacy Act. *Gonzaga*, 536 U.S. at 283, 122 S.Ct. at 2275. [FN5]
>
> FN5. In addition, unlike the Privacy Act, the *Gonzaga* court held that FERPA is essentially "spending legislation," which rarely "confer[s] enforceable rights." *Gonzaga*, 536 U.S. at 279, 122 S.Ct. at 2273.
>
> As for the factors of *Blessing*, the language of section

7 is clearly intended to benefit individuals, as discussed above; is specific rather than amorphous; and is clearly mandatory. To read the statute is to see that it easily meets the three criteria of *Blessing*. First, because we have already concluded that Congress created an "unambiguously conferred right" in section 7 of the Privacy Act, we necessarily conclude that the language is intended to benefit individuals. Secondly, the prohibitions of the statute are clear and specific: no "Federal, State or local government agency [may] deny ... any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number." 88 Stat. at 2194. Finally, the language, "It shall be unlawful" is mandatory rather than precatory. These words indicate a clear prohibition of specific behavior by Federal, State or local government rather than an "aspirational" goal or "yardstick." *See Blessing*, 520 U.S. at 343, 117 S.Ct. at 1361.

However, "[e]ven if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983." *Blessing*, 520 U.S. at 341, 117 S.Ct. at 1360. To establish that the presumption cannot be rebutted, courts must look to whether Congress intended to "foreclose[ ] a remedy under § 1983" either "expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* As the text demonstrates, Congress did not explicitly foreclose an action under § 1983. Thus, the relevant question is whether Congress did so "impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement." *Id.* Again, to read the statute is to answer the question. Section 7 contains no enforcement scheme at all. And, as we have explained above, although section 3 of the Privacy Act contains a comprehensive remedial scheme, section 3 specifically states that its

remedial scheme applies *only* to section 3. Thus, the presumption that the rights conferred by section 7 of the Privacy Act may be vindicated via a suit under § 1983 stands, and we hold that the rights conferred by section 7 may be enforced under § 1983.

B. *If the Privacy Act allows for a private right of action, whether Congress exceeded its authority in enacting the Privacy Act, rendering the Privacy Act unconstitutional.*

Cox argues that if Appellants may sue a State for violation of the Privacy Act via § 1983, then Congress exceeded its authority in passing the Privacy Act. Cox argues that the only possible source of authority for the Privacy Act was Congress's Commerce Clause power. The Government argues, however, that Congress's right to establish the use of SSNs arises from the "general welfare clause," which authorizes Congress to spend money for the general welfare. This power is "quite expansive." *Buckley v. Valeo*, 424 U.S. 1, 90, 96 S.Ct. 612, 668, 46 L.Ed.2d 659 (1976). In addition, the Government argues, the Necessary and Proper Clause "authorizes Congress ... to adopt measures that bear a rational connection to any of its enumerated powers." *United States v. Edgar*, 304 F.3d 1320, 1326 (11th Cir.), *cert. denied*, 537 U.S. 1078, 123 S.Ct. 679, 154 L.Ed.2d 577 (2002). Thus, the Government argues, because Congress had the authority to authorize the creation of SSNs, Congress has the authority to "safeguard[ ] the proper use of social security numbers by prohibiting federal, state, and local governments from conditioning an individual's legal rights on disclosure of his social security number." We agree with the Government and hold that Congress did not exceed its authority in passing the Privacy Act.

C. *Whether Georgia qualifies for the "grandfather" exception of section 7(a)(2)(B) of the Privacy Act.*

APPENDIX E

Section 7(a)(2) of the Privacy Act makes an exception for agencies which "maintain[ed] a system of records in existence and operating before January 1, 1975," but only "if such disclosure was required under statute or regulation adopted [before January 1, 1975] to verify the identity of an individual." 88 Stat. at 2194. Thus, to qualify for the grandfather exception, Georgia must show that it meets two criteria: (1) that it maintained a system of records operating before January 1, 1975; and (2) that the system required the disclosure of an individual's SSN to verify the identity of that individual. [FN6]

> FN6. Cox states that "[t]he registration card set forth in Section 34-609 [now O.C.G.A. § 21-2-219] contained a blank for the individual's social security number '(If known at the time of application)' " and that the Form was not changed to delete the phrase "if known at the time of the application," until 1995. Thus, before 1975, the SSN was not required; it was only required "if known at the time of the application." Cox's acknowledgment may warrant summary judgment for Appellants because it would indicate that Georgia cannot meet the second requirement. Nonetheless, we remand this issue to the district court because further fact-finding may be necessary and in deference to "the general rule ... that a federal appellate court does not consider an issue not passed upon below." *Iraola & CIA, SA v. Kimberly-Clark Corp.*, 325 F.3d 1274, 1284-85 (11th Cir.2003) (internal quotation omitted).

Because we hold that the rights conferred by the Privacy Act may be vindicated via a private right of action under § 1983, we remand the issue of whether Georgia

qualifies for the "grandfather" exception of the Privacy Act to the district court to address in the first instance.

D. *Whether Georgia's voter registration forms comply with the notice requirements of section 7(b) of the Privacy Act.*

Appellants argue that Georgia's Voter Registration Form fails to comply with the notification requirements of section 7(b) of the Privacy Act because the Form does not inform voters under what authority the demand for their SSNs is made. Secondly, Appellants argue that the Form promises confidentiality and "internal" use only. Cox admits that state law allows the SSNs to be disclosed to other Georgia state agencies if requested by those agencies.

However, Cox notes that the Form has been modified to contain citations to O.C.G.A. §§ 21-2-219 and 21-2-220 as statutory authority for requiring the SSNs. Cox also states that the other modification to the card is that it will now explain that "internal use only" "means to identify and verify the identity of voters." If it is true that other state agencies in Georgia will have access to Georgia voters' SSNs, this modification would seem insufficient to bring the Form into compliance with section 7(b) of the Privacy Act. The district court did not reach this issue because it found that the Privacy Act could not be enforced by a private right of action. Thus, we remand this issue to the district court to consider in the first instance.

E. *Whether the district court erred in holding that section 1971 of the Voting Rights Act may not be enforced by a private right of action under § 1983.*

Appellants also contend that Georgia's requirement that voters supply their SSNs in order to vote violates 42 U.S.C. § 1971(a)(2)(B) of the Voting Rights Act, which forbids the practice of disqualifying potential voters for their failure

to provide information irrelevant to determining their eligibility to vote. This provision was intended to address the practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters. *See Condon v. Reno*, 913 F.Supp. 946, 949-50 (D.S.C.1995). For example, one "such tactic[ ] [was to] disqualify[ ] an applicant who failed to list the exact number of months and days in his age." *Id.* Section 1971(c), the provision authorizing the Attorney General to sue to enforce § 1971, was added to the statute by the Civil Rights Act of 1957. The district court found that Congress intended § 1971(c) to foreclose the possibility of a private right of action under § 1983. The district court relied on the Sixth Circuit's holding in *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir.2000), that § 1971 is only enforceable by the Attorney General.

In *McKay*, the Sixth Circuit relied entirely on *Willing v. Lake Orion Community Schools Board of Trustees*, 924 F.Supp. 815, 820 (E.D.Mich.1996), which in turn relied entirely on *Good v. Roy*, 459 F.Supp. 403, 405-06 (D.Kan.1978). Thus, the extent of the analysis relied on by the Sixth Circuit is the following from *Good*: "Furthermore, subsection (c) provides for enforcement of the statute by the Attorney General with no mention of enforcement by private persons.... [T]he unambiguous language of Section 1971 will not permit us to imply a private right of action." 459 F.Supp. at 405-406.

However, in *Allen v. State Board of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969), and *Morse v. Republican Party of Virginia*, 517 U.S. 186, 116 S.Ct. 1186, 134 L.Ed.2d 347 (1996) (plurality opinion), the Supreme Court found that other sections of the Voting Rights Act, 42 U.S.C. §§ 1973c and 1973h, respectively, could be enforced by a private right

of action, even though those sections also provide for enforcement by the Attorney General.

In *Allen*, which dealt with the provision of the Voting Rights Act requiring judicial scrutiny of alterations of voting qualifications or procedures, the Court reasoned that the goals of the statute were much more likely to be reached if private citizens *1295 were not "required to depend solely on litigation instituted at the discretion of the Attorney General." 393 U.S. at 556, 89 S.Ct. at 827. Thus, the *Allen* Court found that the possibility of enforcement by the Attorney General did not preclude enforcement by private citizens, 393 U.S. at 556-57, 89 S.Ct. at 827, which is contrary to the conclusion reached by *Good* and relied on by the Sixth Circuit. *See also Sierra Club v. Andrus*, 610 F.2d 581, 589 n. 12 (9th Cir.1979) (following *Allen*, the court noted that a provision in the Rivers and Harbors Act of 1899 expressly providing for enforcement by the Attorney General "[did] not necessarily preclude a private right of action"), *rev'd sub nom.* on other grounds, *California v. Sierra Club*, 451 U.S. 287, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981). [FN7]

> FN7. The Supreme Court held that the language of the Rivers and Harbors Act did not show congressional intent to "confer federal rights upon [a particular class of] beneficiaries," but was instead merely "a general proscription of certain activities." *California v. Sierra Club*, 451 U.S. at 294, 101 S.Ct. at 1779.

Furthermore, the provision giving the Attorney General the right to bring a civil suit under § 1971 was not added to § 1971 until 1957. Therefore, from the enactment of § 1983 in 1871 until 1957, plaintiffs could and did enforce the provisions of § 1971 under § 1983. *See, e.g., Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944); *Chapman v.*

King, 154 F.2d 460 (5th Cir.1946); [FN8] *Brown v. Baskin*, 78 F.Supp. 933 (D.S.C.1948).

> FN8. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent the decisions of the former Fifth Circuit issued before October 1, 1981.

In House Report 291, in which the House Judiciary Committee recommended passage of the provision giving the Attorney General the right to enforce the Voting Rights Act, the Committee first stated that the bill's purpose was "to provide means of *further* securing and protecting the civil rights of persons within the jurisdiction of the United States." H.R.Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 1966 (emphasis added). The Committee also noted that "[s]ection 1983 ... has been used [by individuals] to enforce ... section 1971." H.R.Rep. No. 85-291, *reprinted in* 1957 U.S.C.C.A.N. at 1977. Nothing in the Report suggests that the Committee intended the provision granting the Attorney General authority to bring suit to foreclose the continued use of § 1983 by individuals. In fact, the Committee noted: Th[e] right to vote ... is ... the foundation of our representative form of Government. It is the sole means by which the principle of consent of the governed as the source of governmental authority is made a living thing. Deprivation of the right to vote is the first step on the road to tyranny and dictatorship.... [T]he sovereign ... must preserve this fundamental and basic right against any and all unlawful interference. That the proposal of this section does that very thing is clear.

H.R.Rep. No. 85-291, *reprinted in* 1957 U.S.C.C.A.N. at 1977. This language demonstrates an intense focus on protecting the right to vote and does not support the conclusion that Congress meant merely to substitute one

form of protection for another. We agree with Appellants that it is highly unlikely that in "enacting civil rights legislation for the first time since the Reconstruction era [Congress] would simultaneously withdraw existing protection" from § 1971.

Furthermore, in *Morse*, dealing with the provision of Voting Rights Act prohibiting the use of a poll tax, the Supreme Court found that a private right of action had not been foreclosed even though the enforcement scheme of the Voting Rights provision at issue gave the Attorney General the right to sue for violations and was more complete than that of § 1971. *See Morse*, 517 U.S. at 193, 116 S.Ct. at 1192-93.

Appellants also point out that in 1957, in what is now § 1971(d), Congress removed procedural roadblocks to suits under § 1971 by specifying that there was no requirement that a party exhaust judicial or administrative remedies before bringing suit. Appellants argue that this language could not have applied to the Attorney General and thus was meant to "remove[ ] roadblocks for the previously authorized private rights of action under § 1971." We agree.

We conclude that neither § 1971's provision for enforcement by the Attorney General nor Congress's failure to provide for a private right of action expressly in § 1971 *require* the conclusion that Congress did not intend such a right to exist. Thus, we hold that the district court erred by finding that Congress's provision for enforcement by the Attorney General in § 1971(c) precluded continued enforcement of § 1971 by a private right of action under § 1983.

The district court's finding was dispositive on the issue of whether the rights guaranteed by the Voting Rights Act may be enforced by a private right of action under § 1983. *Blessing*, 520 U.S. at 341, 117 S.Ct. at 1360 (noting that

even if a statute creates an individual right, there is still no private right of action if Congress intended to "foreclose[ ] a remedy under § 1983 ... by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983"). Thus, the district court did not need to determine whether § 1971 created enforceable individual rights. Because we conclude that the district court's finding that § 1971's provision for enforcement by the Attorney General precluded private enforcement was error, we must apply the *Gonzaga/Blessing* analysis to § 1971 to determine whether the statute creates rights enforceable by individuals under § 1983.

As discussed above, under *Gonzaga*, we must first ask whether the statute contains "explicit right- or duty-creating language." 536 U.S. at 284 n. 3, 122 S.Ct. at 2276 n. 3 (internal quotations omitted); see also *Alexander v. Sandoval*, 532 U.S. 275, 286-89, 121 S.Ct. 1511, 1519-21, 149 L.Ed.2d 517 (2001) (noting that whether or not a statute creates an implied private right of action depends on Congress's intent, which must be determined by looking first to the text itself). Section 1971 states, "No person acting under color of law shall ... deny the right of any individual to vote in any election because of an [immaterial]-error or omission on any record or paper relating to any application, registration, or other act requisite to voting...." 42 U.S.C. § 1971(a)(2)(B). This language is clearly analogous to the right-creating language cited by the Supreme Court in *Gonzaga*, 536 U.S. at 284 n. 3, 122 S.Ct. at 2276 n. 3, discussed above. The subject of the sentence is the person acting under color of state law, but the focus of the text is nonetheless the protection of each individual's right to vote.

Next, as required by *Blessing*, the statute clearly provides rights which are specific and not amorphous. The statute protects an individual's right to vote; specifically, *1297 the statute forbids a person acting under color of law

to disqualify a potential voter because of his or her failure to provide unnecessary information on a voting application.

Finally, the language of the statute is mandatory rather than precatory: "*No person* acting under color of law *shall ... deny* the right of any individual to vote...." 42 U.S.C. § 1971(a)(2)(B) (emphasis added).

Thus, we hold that the provisions of section 1971 of the Voting Rights Act may be enforced by a private right of action under § 1983.

F. *Whether the disclosure of his or her SSN is "material" in determining whether a person is qualified to vote under Georgia law for purposes of the Voting Rights Act.*

Section 1971(a)(2)(B) of the Voting Rights Act is often referred to as "the materiality provision," and, as discussed above, requires that no person be denied the right to vote "because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 42 U.S.C. § 1971(a)(2)(B). Cox argues that because Georgia's Voter Registration Form requires that potential voters supply their SSNs, they are not "qualified under State law to vote" unless they have supplied their SSNs and thus filled out the Form. However, Appellants point out that according to the Form and O.C.G.A. § 21-2-216, the only *qualifications* for voting in Georgia are U.S. Citizenship, Georgia residency, being at least eighteen years of age, not having been adjudged incompetent, and not having been convicted of a felony. O.C.G.A. § 21-2-216 (1998).

Because the district court found that section 1971 of the Voting Rights Act did not provide for a private right of

action, the court did not reach the issue of whether the disclosure of a person's SSN is "material" in determining whether he or she is qualified to vote under Georgia law for purposes of § 1971. Thus, we remand this issue to the district court to address in the first instance.

V. *CONCLUSION*

A. *Privacy Act Claims*

In summary, we hold that the rights conferred by the Privacy Act may be vindicated by a private suit under § 1983. We also hold that Congress did not exceed its authority in enacting the Privacy Act.

We remand to the district court the issues of whether Georgia qualifies for the "grandfather" exception of section 7(a)(2)(B) of the Privacy Act and whether Georgia's Voter Registration Form complies with the notice requirements of section 7(b) of the Privacy Act.

B. *Voting Rights Act Claims*

We hold that the district court erred in finding that section 1971 of the Voting Rights Act does not provide for enforcement by a private right of action under § 1983. We remand to the district court the issue of whether the disclosure of a potential voter's SSN is "material" in determining whether he or she is qualified to vote under Georgia law for purposes of section 1971 of the Voting Rights Act.

REVERSED and REMANDED.

APPENDIX F

United States District Court,
W.D. Michigan, Southern Division.

Melissa Ann BARBER, Steven Barber, David Hall, Paul Jensen, Jennifer Kula-Hauk, Steven Pettit, Troy Huizing,

Plaintiffs,

v.

William OVERTON, Director of the Michigan Department of Corrections, in his official capacity; Fritz Jackson, Lorenzo Lowery, and Bruce Sibert, in their individual and official capacities,

Defendants.

No. 1:03-CV-329.

Aug. 20, 2005.

Andrew Nickelhoff, Marshall J. Widick, Sachs Waldman PC, Detroit, MI, H. Rhett Pinsky, Pinsky Smith & Fayette, LLP, Grand Rapids, MI, for Plaintiffs.

A. Peter Govorchin, Frank J. Monticello, Linda M. Olivieri, Michigan Department Attorney General, Lansing, MI, for Defendants.

MEMORANDUM OPINION AND ORDER

BELL, Chief J.

*1 This matter is before the Court on Defendants' motion to tax costs pursuant to Fed. R. Civ. P. 54(d). On June 21, 2005, the Court granted Defendants' motion for summary judgment, dismissing Plaintiff's § 1983 claims, state constitutional claims, and state law tort claims against all Defendants. Thereafter, Defendants' filed the present motion to tax costs in the amount of $3,538.44. Plaintiffs'

filed a timely objection. For the reasons stated below, the Court denies Defendants' motion to tax costs.

I.

Rule 54(d) of the Federal Rules of Civil Procedure provides, "[e]xcept when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs...." This language "creates a presumption in favor of awarding costs, but allows denial of costs at the discretion of the trial court." *White & White, Inc. v. Am. Hosp. Supply Corp.*, 786 F.2d 728, 730 (6th Cir.1986). Thus, the unsuccessful party has the burden of overcoming the presumption favoring an award of costs. *Soberay Mach. & Equip. Co. v. MRE Ltd., Inc.*, 181 F.3d 759, 770 (6th Cir.1999); *Goostree v. Tennesse*, 796 F.2d 854, 863 (6th Cir.1986) ("[I]t is incumbent upon the unsuccessful party to show circumstances sufficient to overcome the presumption favoring an award of costs to the prevailing party."). The Court may deny costs to the prevailing party if "it would be inequitable *under all the circumstances in the case* to put the burden of costs upon the losing party." *White & White, Inc.*, 786 F.2d at 730 (quoting *Lichter Foundation, Inc. v. Welch*, 269 F.2d 142, 146 (6th Cir.1959)) (emphasis in original).

In *White & White, Inc.*, the Sixth Circuit identified certain circumstances in which a denial of costs is a proper exercise of discretion: 1) where taxable expenditures are unnecessary or unreasonably large; 2) where the prevailing party should be penalized for unnecessarily prolonging trial or injecting unmeritorious issues; 3) where the prevailing party's recovery is so insignificant that the judgment amounts to a victory for the defendant; and 4) cases that are close and difficult. 786 F.2d at 730. None of these circumstances apply to this case. The court also identified other relevant factors including good faith of the losing party, the propriety with which the losing party

conducts the litigation, whether the prevailing party benefitted from the case, whether the public benefitted from the case, and whether the award of costs will have a chilling effect on other litigants. *White & White, Inc.*, 786 F.2d at 730-31; *see also Rosser v. Pipefitters Union Local 392*, 885 F.Supp. 1068, 1071-72 (S.D.Ohio 1995).

In this case, Plaintiffs undoubtedly filed and prosecuted this matter in good faith and properly conducted themselves throughout the litigation. This alone, however, is insufficient to deny costs. *Id.* at 730 (citing *Coyne-Delany v. Capital Development Board of Illinois*, 717 F.2d 385, 390 (7th Cir.1983)). In addition to Plaintiffs' good faith, the Court also finds that an award of costs could have a chilling effect upon other civil rights litigants. *See Rosser*, 885 F.Supp. at 1072. Although the Court found that Defendants' were entitled to qualified immunity on Plaintiffs' constitutional claims, Plaintiffs' have suffered a significant degree of harm from the release of their private personal information to the prisoner population of the Ionia Maximum Security Correctional Facility. Due to the significance of the interests at stake, an award of costs may have a chilling effect on civil rights litigants seeking to vindicate their privacy interests. Based upon Plaintiffs good faith in bringing and prosecuting the suit, their reasonable conduct throughout the proceeding, and the likelihood of a chilling effect upon civil rights litigants, the Court denies Defendants' motion to tax costs. Accordingly,

IT IS HEREBY ORDERED that Defendant's motion to tax costs (Docket # 124) is DENIED.

W.D.Mich.,2005.
Barber v. Overton

Slip Copy, 2005 WL 2018134 (W.D.Mich.)

No. 05-554

In the Supreme Court of the United States

DANIEL A. SCHMITT,

Petitioner,

v.

CITY OF DETROIT, LORETTA NEAL, MARK VANN, JAMES FLORKOWSKI, BRYANT JENKINS, AND T.W. GRAPHICS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LINDA D. FEGINS
Counsel of Record

CITY OF DETROIT LAW DEPARTMENT
660 WOODWARD AVENUE
SUITE 1650
DETROIT, MI 48226
(313) 237-3022

Counsel for Respondents

Becker Gallagher Legal Publishing, Inc. 800.890.5001

COUNTER-QUESTION PRESENTED FOR REVIEW

Where Petitioner failed to meet the statutory criteria of The Privacy Act of 1974, 5 U.S.C. §552a,of proving that he was adversely affected by an intentional or willful violation of the Act by the City and the Social Security Act, 42 U.S.C. §405(c)(2)(C)(i),which authorizes the use of social security numbers, serves as an alternative ground for the Sixth Circuit decision, Did the Sixth Circuit reach the right result because Petitioner is not entitled to relief under the Privacy Act, and therefore, the purported conflict between the Sixth and Eleventh Circuits is immaterial and does not present an issue of sufficient importance to warrant review by this Court?

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Statutes

Other Authorities

SUPPLEMENT TO STATUTORY PROVISIONS INVOLVED

The statutory authority to use the social security numbers for income tax purposes is pursuant to the Social Security Act, 42 U.S.C. § 405(c)(2)(C)(i) and (v) which provides as follows:

(c) Records of wages and self-employment income

* * *

(2)

* * *

(C)

(i) It is the policy of the United States that any State (or political subdivision thereof) may, in the administration of any tax, general public assistance, driver's license, or motor vehicle registration law within its jurisdiction, utilize the social security account numbers issued by the Commissioner of Social Security for the purpose of establishing the identification of individuals affected by such law, and may require any individual who is or appears to be so affected to furnish to such State (or political subdivision thereof) or any agency thereof having administrative responsibility for the law involved, the social security account number (or numbers, if he has more than one such number) issued to him by the Commissioner of Social Security.

* * *

(v) If and to the extent that any provision of Federal law heretofore enacted is inconsistent with the policy set forth in clause (i), such provision shall, on and after the date of the enactment of this subparagraph [enacted Oct. 4, 1976], be null, void, and of no effect. If and to the extent that any such provision is inconsistent with the requirement set forth in clause (ii), such provision shall, on and after the date of the enactment of such subclause, be null, void, and of no effect.

SUPPLEMENT TO STATEMENT OF FACTS

The City of Detroit (hereinafter City) imposes and collects a tax on income from residents of the City and non-residents who work in the City or derive income from business and entertainment activities in the City. The tax is imposed under the City's Income Tax Ordinance, 1984 Detroit City Code § 18-10-1 et seq. The ordinance is authorized by the State of Michigan's City Income Tax Act, MCL 141.501 et seq.

Under MCL 141.642, and 1984 Detroit City Code § 18-10-11, a City income tax return shall set forth the number of exemptions, place of residence, place of employment and "other pertinent information as shall reasonably be required." Included in the "other pertinent information" on a City tax return is a person's social security account number. The City of Detroit, like the State of Michigan, and the federal government, uses social security numbers to identify taxpayers, which is a widespread practice allowed by the Internal Revenue Code, 26 U.S.C. § 6109(d). Similar to the federal and state governments, which send tax return forms by mail to persons in their database, the City has a database of names, addresses, and social security numbers based on taxpayer information that has been provided to the City by the

taxpayer. (R.30,Tr.3/24/2003 pgs.5,7-9;Apx. Pg. 289, 291-293).

The City argued in the district court and in the Sixth Circuit Court of Appeals that pursuant to the Social Security Act, 42 U.S.C. § 405(c)(2)(C)(i), the notice provision of § 7(b) of the Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896, 5 U.S.C. § 552a (2004) (hereinafter Privacy Act) do not apply to the administration of any tax law such as the City's Income Tax Ordinance and Michigan's City Income Tax Act. (R.30; R.9; Apx. pgs. 93, 102-103,289,291-293).

Petitioner Schmitt admitted that he was not denied any right or privilege as a result of the mailing label mishap. Schmitt v. City of Detroit, 267 F.Supp.2d 718 (E.D. Mich. 2003); Pet. Apx. C, p 22a fn 6.

The district court ruled that Petitioner failed to prevail on a claim arising under the Privacy Act because he failed to show that the City's actions had an adverse effect on Schmitt and that the City willfully or intentionally violated § 7b of the Privacy Act. Schmitt, supra; Pet. Apx. C, p 22a. Therefore, even if Plaintiff had an implied cause of action under the Privacy Act, Plaintiff failed to meet the statutory criteria or the Sixth Circuit test for entitlement to damages pursuant to the Privacy Act. Id.

Plaintiff agreed to dismiss the federal claims against all the individual Defendants. Id., Pet Apx. C, p.15a. The Court then dismissed the individual Defendants with prejudice. Plaintiff provided no evidence of damages.

REASONS FOR DENYING THE WRIT

There exist three independent reasons for denying Petitioner's request for the issuance of the writ of certiorari. Consideration of the Question Presented by Petitioner is inappropriate in light of the record in the case. The Social Security Act, 42 U.S.C. § 405(c)(2)(C)(i)(v), allows the use and the request to disclose social security numbers for tax collection purposes and is not limited by the Privacy Act under the facts of this case. In any event, the purported conflict between the Sixth and Eleventh Circuits is immaterial to the outcome of the case in light of the record and does not present an issue of practical significance to warrant review by this Court.

I. Consideration of the Question Presented by the Petition for a Writ of Certiorari is Inappropriate or will not be Dispositive in Light of the Record in this Case.

Consideration of the Question Presented by Petitioner is inappropriate when viewed in the context of the entire record in this matter. Any decision by this Court as to the Question Presented will not be dispositive in this case. Petitioner cannot pass the threshold standard for recovery under the Privacy Act, even assuming arguendo he was entitled to sue the City under the Act, which as the law stands he does not.

A. Petitioner Admitted He was not Denied a Right or Benefit and Petitioner Failed to Prove, and There is no Evidence, that any Purported Violation of the Privacy Act by the City was Willful or Intentional.

Section 7 of the Privacy Acts bars an agency from denying "any individual, any right, benefit or privilege provided by law because of such individual's refusal to disclose his social

security account number (SSN) to the agency". § 7(a)(1). The City did not inform Petitioner of the purpose for requesting his social security number on the tax forms it requires residents and non-residents to complete who work in the City of Detroit or derive income from business activities in the City.

Plaintiff admitted that he had not been denied any right or privilege by the failure of the City to state the purpose of the request to disclose his social security number (SSN). Schmitt v. Detroit, 267 F.Supp.2d 718 (E.D.Mich. 2003); Pet. Apx. C., p. 22a fn6. The district court correctly held "it is implausible that the City's action adversely affected Plaintiff because he has admitted that the City did not harm him by requesting his social security number." Id. Furthermore, the district court ruled that Petitioner failed to prove that the City acted intentionally or willfully in requesting the SSN in light of the Internal Revenue's Services allowance of the use of SSN for taxpayer identification purposes and that state and local authorities follow that practice. Id.

Therefore, even if Petitioner has an implied cause of action, Plaintiff has not met the statutory criteria for entitlement to damages pursuant to the Privacy Act. Id. The Sixth Circuit Court of Appeals did not reverse the ruling on that issue or address that aspect of the district court's decision. A ruling by the Supreme Court would not have a dispositive effect as Petitioner's claim is barred by failure to meet the statutory criteria for recovery under the Privacy Act. Significantly, the Supreme Court would have to review facts that are outcome determinative and which were not decided by the Sixth Circuit, which makes this case not certworthy. Petitioner cannot prevail even if this Court would grant certiorari in this case.

Even assuming that the City's request for Petitioner's social security number without the 7(b) disclosure requirement violated the Privacy Act, Petitioner still fails to state a cognizable claim against the Respondents. Schmitt is not entitled to recover damages, as any such violation has not been shown to be "intentional or willful" as required under the Act to sustain an award of damages. Schmitt, supra, Pet. Apx. C, p.22a. In order to prove a violation of the Privacy Act, plaintiff must establish (1) a violation of the Privacy Act, (2) the violation was intentional or willful, and (3) the violation had an adverse effect on Plaintiff. Cardamone v. Cohen, 241 F.3d 520 (6th Cir. 2001); Hudson v. Reno, 130 F.3d 1193, 1197 (6th Cir. 1997); Henson v. NASA, 14 F.3d 1143, 1149 (6th Cir. 1994) (plaintiff must prove that the government's actions were intentional or willful); Wiley v. Department of Veteran Affairs, 176 F.Supp. 2d 747 (E.D. Mich. 2001) (must be intentional or willful in a manner beyond gross negligence and agency must disclose information without grounds for believing it to be lawful); Kostyu v. United States, 742 F. Supp. 413, 416 (E.D. Mich. 1990) (culpability under the Privacy Act requires a showing of fault greater than gross negligence); Albright v. United States, 235 U.S. App. D.C. 295;732 F.2d 181, 189 (D.C. Cir. 1984) (intentional or willful standard under the Privacy Act does not encompass all voluntary actions with might otherwise inadvertently contravene one of the Act's strictures).

In the United States Supreme Court decision of Doe v. Chao, 540 U.S. 614, 124 S. Ct. 1204, 157 L.Ed. 2d 1122 (2004) the petitioner's social security number was disseminated to a group of claimants, their employers and others when he placed his SSN on an application form to seek benefits under the Black Lung Benefit Act. The Supreme Court in Doe acknowledged that a Plaintiff must demonstrate

that he was adversely affected by an intentional or willful agency action and prove actual damages to come within the criteria for the Act. Id. at 620-622, 626.

The district court found in the instant case that neither the City nor the individual Defendants intentionally or willfully violated Schmitt's rights under the Privacy Act. Schmitt v. City of Detroit, 297 F. Supp. 2d 718 (E.D.Mich. 2003); Pet. Apx C, p. 22a. Petitioner failed to state a cognizable claim or to allege facts sufficient to support a violation of the Privacy Act. Id. There is no evidence that the City published the social security numbers without grounds for believing such action to be lawful or that it flagrantly disregarded Plaintiff's rights. Id.; Ramero-Vargas v. Shalala, 907 F. Supp. 1128 (N.D. Ohio 1995).

Significantly, requests for taxpayers' social security numbers are mandated by the Internal Revenue Service's use of those numbers for taxpayer identification purposes on federal tax forms and W2 forms. 26 U.S.C. § 6109(d). Therefore, the district court correctly ruled that since the City's practice follows the widespread practice of the IRS and most local and state tax authorities, Plaintiff failed to show that the City acted intentionally or willfully. Schmitt, supra, 297 F. Supp. 2d 718, Pet. Apx. C, p. 22a.

Under these facts, the record simply does not permit the inference that Respondents acted with flagrant disregard for Plaintiff's rights under the Privacy Act, especially in light of the fact that Petitioner admitted the City did not harm him by requesting the SSN. Negligence does not suffice to satisfy the Act's "intentional or willful" standard for an award of damages. Petitioner failed to satisfy the elements to establish a violation under the Privacy Act or to produce evidence of

injuries of the sort that would sustain an award of damages under the Act.

B. Plaintiff Has Not Shown Actual Damage or Injuries to Sustain an Award for Damages or Attorney Fees.

If an agency intentionally or willfully violates the Privacy Act, or any rule promulgated under it, in such a way as to have an adverse effect on an individual, the aggrieved individual may bring a civil action against the agency, and may recover (a) the greater of $1,000 or the individual's actual damages, and (b) reasonable attorney fees and costs. 5 U.S.C. § 552a(g)(1)(D)(4)(A). Plaintiff failed to produce any evidence of injuries of the sort that would sustain an award of damages. Plaintiff did not show actual pecuniary loss in order to bring the claim within the Privacy Act. See Hudson v. Reno, 130 F.3d 1193, 1207 (6th Cir. 1997). Plaintiff produced no evidence of actual damage in the district court.

In the Sixth Circuit a plaintiff may recover actual damages if there is an "intentional or willful violation". Wiley v. Department of Veteran Affairs, 176 F.Supp. 2d 747, 775 (E.D. Mich. 2001); Hudson v. Reno, 130 F.3d 193, 1206-1207 (6th Cir. 1997). To be entitled to recovery under the Act, however, a plaintiff must prove that he or she has suffered "actual damages." Actual damages under the Privacy Act do not include recovery for mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries. Hudson v. Reno, at 1207 (internal quotations and citations omitted). Emotional damages are not recoverable. Wiley v. Department of Veteran Affairs, supra. In Doe v. Chao, 540 U.S. 614, supra, the United States Supreme Court reversed the Fourth Circuit Court of Appeals which held that a Plaintiff could obtain damages for emotional distress on learning of the

improper disclosure of his social security number. The United States Supreme Court held that merely showing intentional or wilful violation of the Act is insufficient. The Plaintiff must have suffered actual damages. Id.

Schmitt is not "a person entitled to recovery." Petitioner did not prove he suffered an adverse action and an injury in district court, but simply asserted a fear of future damages and distress. There is no authority for the proposition that fear of future injury constitutes an adverse effect within the meaning of the act. See generally, Romero-Vargas, supra. Schmitt failed to establish a causal nexus between Defendant's disclosure and some "adverse effect" he suffered. See Quinn v. Stone, 978 F.2d 126, 131 (3d Cir. 1992). In light of the record, the Court's review of the purported conflict between the Sixth and Eleventh Circuits will not make a difference in the result as Petitioner cannot prevail as a matter of law on the facts determined by the district court.

C. Federal Law Bars an Award of Attorneys' Fees to Plaintiff.

There is no authority in the Privacy Act statute for an award of attorneys' fees other than against a federal agency for Petitioner's claim of prospective declaratory relief under § 7 (b). None of the district court cases, which allowed only prospective declaratory relief, awarded attorneys' fees. See, Greidinger v. Davis, 782 F. Supp. 1106 (E.D.Va. 1992), rev'd, 988 F.2d 1344 (4th Cir. 1993) (expressly denying attorneys' fees on Section 7(b) claim).

Declaratory relief does not entitle Petitioner to an award of attorneys' fees. To the contrary, the long established "American rule" is that attorneys' fees cannot be recovered by a litigant absent a contract, an express statutory provision,

misconduct in litigation, or the equivalent of a common fund. See, Haycraft v. Hollenbach, 606 F.2d 128 (6th Cir. 1979). None of those exceptions apply in this case. Significantly, Plaintiff should not be entitled to attorney fees when he failed to prove the mandatory element that the City willfully or intentionally violated the Privacy Act. 5 U.S.C. § 552a(g)(1)(D)(4).

II. The City is Authorized by Federal Law to Both Use and Require the Disclosure of Social Security Numbers in the Administration of its Income Tax Law, and Therefore no Real Conflict Between the Eleventh and Sixth Circuits Exists.

An alternative ground for upholding the result of the Sixth Circuit Court of Appeals exists which makes the issue of whether Petitioner has a implied right to sue the City under the Privacy Act of no practical importance in the present case. There are two exceptions to Section 7 of the Privacy Act making it illegal for any federal, state or local agency to deny any individual any right, benefit or privilege solely because an individual refuses to disclose his or her Social Security Number(SSN). Petitioner conveniently ignores the clear language of § 7(2) which states that the provisions of paragraph 7(a)(1) shall not apply with respect to:

> A. Any disclosure which is required by Federal statute,... § 7(2)(A).

In the Tax Reform Act of 1976, Congress enacted a new provision, 42 U.S.C. § 405(c)(2)(C)(i) which amended the Social Security Act, and allowed the use of Social Security Numbers in the administration of any tax within its jurisdiction as a means of identifying individuals on state and local income tax returns. Thus, Petitioner's claim that the City

violated the Privacy Act by requiring the disclosure of his social security number on the City's income tax return is without merit. The Privacy Act of 1974 was implicitly repealed, in part, by the 1976 amendments to the Social Security Act. That amendment allows any State, or political subdivision thereof, to utilize social security numbers for certain categories of state activity. 42 U.S.C. § 405(c)(2)(C)(i) and (v) provide:

> (i) It is the policy of the United States that any State (or political subdivision thereof) may, in the administration of any tax, general public assistance, driver's license, or motor vehicle registration law within its jurisdiction, utilize social security account numbers issued by the Commissioner of Social Security for the purpose of establishing the identification of the individuals affected by such law, and may require any individual who is or appears to be affected to furnish to such State (or political subdivision thereof) or any agency thereof having administrative responsibility for the law involved, the social security account number (or numbers, if he has more than one such number) issued to him by the Commissioner of Social Security.
>
> . . .
>
> (v) If and to the extent that any provision of Federal law heretofore enacted is inconsistent with the policy set forth in clause (i), such provision shall, on and after the date of enactment of this subparagraph [enacted October 4, 1976], be null, void, and of no effect. . . .

It is clear from a plain reading of this 1976 amendment to the Social Security Act that the City of Detroit, as a political subdivision of the State of Michigan, may, in the administration of it's tax law, "utilize social security account numbers issued by the Commissioner of Social Security for the purpose of establishing the identification of the individuals affected by such law. . . ." Specifically, the City of Detroit may require the disclosure of the social security number for tax collection purposes. While repeals by implication are disfavored, this Court has established an exception to the repeal-by-implication rule. It has been held that where provisions in two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one. See Posadas v. National City Bank, 296 U.S. 497, 503, 56 S.Ct. 349, 80 L.Ed. 351 (1936).

Congress could not have intended the oddity of allowing federal, state or local agencies to utilize social security account numbers for the purpose of establishing and verifying the identity of persons in the administration of any tax pursuant to 42 U.S.C. § 405(c)(2)(C)(i), and yet subject them to liability under the general provisions of the Privacy Act for failure to comply with §7(b) of the Privacy Act. The City or any municipal or state agency should not be subject to such an absurd result. This is especially true when the Privacy Act itself recognizes there are exceptions to holding an agency liable when another federal statute authorizes the conduct. If an agency can require disclosure of a SSN for tax collection purposes under federal law, it does not follow or make any sense to hold an agency liable for failure to tell an individual whether the disclosure is mandatory or voluntary.

Federal courts have dismissed challenges to state mandated disclosure of social security numbers in connection with state driver's license laws which like tax laws, are

exempt from the Privacy Act. In Kasler v. Howard, 323 F.Supp. 2d 675 (W.D.N.C. 2003), affirmed 78 Fed. Appx. 231 (4th Cir. 2003), the Fourth Circuit upheld the district court's dismissal of plaintiff's claim that the state requirement that an applicant must provide a SSN as a condition of obtaining a driver's license violates the Privacy Act of 1974. 323 F. Supp. at 678. The district court held that the Tax Reform Act of 1976 expressly exempts state agencies from the requirement of the Privacy Act so long as the required disclosure of a SSN is "for the administration of any... driver's license..." Id. at 679. See Stroianoff v. Commissioner of Motor Vehicle, 107 F.Supp.2d 439 (S.D.N.Y. 2000), affirmed, 12 Fed. Appx. 33, cert denied, 534 U.S. 954, 122 S. Ct. 352, 152 L.Ed.2d 266 (2001), r'hrg denied, 122 S. Ct. 1352 (2002), (Court found that the Social Security Act had preempted Section 7(a) and allowed the state agency, in the limited circumstance of issuing a driver's license, to request and use plaintiffs' Social Security number).

As explained above, even if Petitioner had an implied right of action under the Act, the Social Security Act sanctions the City's conduct. Further, Petitioner does not meet the statutory criteria for recovery and there is no civil damages remedy available against the City, because Plaintiff has failed to meet the threshold elements required under the Act.

III. Under the Facts of this Case There is no Genuine or Material Conflict Between the Sixth and Eleventh Circuits and There is no Private Right of Action Against Respondents under the Privacy Act as the Sixth Circuit Rightly Decided.

There is no basis for revisiting the Sixth Circuit's application of the Privacy Act in light of the statutory language and legislative history in this case. Faced with a record below which makes the case inappropriate for review, coupled with statutory language that states § 7 does not apply because the Social Security Act allows the disclosure of the SSN for tax purposes, this case does not warrant judicial review. The instant case involves the City's request for the disclosure of Petitioner's SSN for verification of identity in the administration of tax collection. Hence, the City falls outside the reach of the Privacy Act pursuant to the 1976 Amendment to the Social Security Act, which permits disclosure of the SSN for tax purposes and "declares that any law contrary to it is void". 42 U.S.C. § 405 (c)(2)(C)(v).

The existence of the exception to § 7(a) makes any purported conflict between the Sixth Circuit and the Eleventh Circuit immaterial. Even assuming arguendo that the Privacy Act was applicable to municipalities, the Petitioner still cannot prevail under the facts of this case. Significantly, Schwier v. Cox, 340 F.3d 1284(11th Cir. 2003), Pet. Apx. E, p. 31a, agrees with this position. The Eleventh Circuit admits that the final version of the Tax Reform Act which amended the Social Security Act, "authorizes States to use SSN only in the administration of any tax....42 U.S.C. § 405 (c)(2)(C)(i) 2003". (Pet Apx. E, p.31a). Schwier v. Cox, supra addressed whether one could be denied the right to vote unless one submitted his social security number. The administration of the right to vote does not fall under the protection of the

Social Security Act as amended by the Tax Reform Act of 1976.

Petitioner settles on a flawed premise and an overly narrow view that Section 7(b) is not subject to the limitation of the text of 5 U.S.C. § 552 a(a)(1), the definition of an agency, which does not apply to state and local agencies. Yet, Petitioner sought damages against the City and its employees under 5 U.S.C. § 552 a(g)(1)(D)(4)(A) which provides a civil damages remedy against an "agency" for certain violations of the Privacy Act. To bring an action under this law, the defendant must be a federal agency. § 552(a)(g)(1). The Privacy Act looks to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(f),(formerly 552e), for the definition of "agency". § 552a(a)(1); Cardamone v. Cohen, 241 F.3d 520, 524 (6th Cir. 2001). 5 U.S.C. § 552(f) provides:

> For purposes of this section, the term "agency" ... includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

The City is not a "federal agency" as defined by the Privacy Act. Schmitt v.City of Detroit, supra, 267 F. Supp. 2d 718; Pet. Apx. C, p. 19a-20a.

Petitioner cannot conveniently ignore the fact that it voluntarily dismissed the individual named Respondents. The issue of whether they can be sued, in their individual or official capacity, which they cannot, (see Polochowski v.

Gorris, 714 F.2d 749 (7th Cir 1983); Windsor v. Tennessean, 719 F2d 155, 159 (6th Cir. 1983)), is not before this Court.

Application of the Privacy Act to state and local agencies, would circumvent the intent of Congress that the rights secured by the Privacy Act be enforceable only against federal agencies. Dittman v. State of California, 191 F.3d 1020 (9th Cir. 1999). Thus, the Act does not cover records maintained by units of state or local government. Perez-Santos v. Malave, 23 Fed. Appx. 11 (1st Cir. 2001) (Privacy act applies only to federal government and not state agencies or individuals employed by State); Dittman v. California, 191 F.3d 102, 1026 (9th Cir. 1999) (Privacy Act does not apply to state agencies or individuals); St. Michael's Convalescent Hospital v. California, 643 F.2d 1369, 1373 (9th Cir. 1981), Polochowski v. Gorris, 714 F.2d 749 (7th Cir. 1983). See also Kasler v. Howard, 323 F. Supp. 2d 675 (W.D.N.C. 2003), aff'd. 78 Fed. Appx. 231 (4th Cir. 2003); Fetzer v. Cambria County, et al., 384 F. Supp. 2d 813 (W.D. Pa. 2005); Stroianoff v. Commissioner of Motor Vehicles, 107 F. Supp. 2d 439, 444 (E.D.N.Y. 2000), aff'd, 12 Fed. Appx. 33; Pritzker v. City of Hudson, 26 F. Supp. 2d 433 (N.D.N.Y. 1998) (privacy protection for records under Privacy Act is not applicable to state or local agencies).

Petitioner misrepresents to this Court that the Sixth Circuit "incorrectly declaimed that other courts have likewise concluded that the Privacy Act applies only to federal agencies". (Pet.'s Brief, p. 11). The case law above indicates clearly that other courts have determined that the Privacy Act applies only to federal agencies. Congress when considering the Privacy Act, specifically limited its scope to federal agencies although the bill as originally introduced was to apply to state authorities. S. Rep. No. 93-1183, 93d Congress 2d Sess reprinted in 1974 U.S. Code Cong. & Admin. News

6916, 6932; Polchowski v. Gorris, 714 F.2d 749, 752 (7th Cir. 1983). The provisions applying to local and state agencies were deleted because of the uncertain effect the provisions would have and because of the insufficient record Congress lacked the necessary information for devising a remedial scheme. 1974 U.S. Code Cong. & Adm. News at 6933-34; Polchowski, supra, 714 F2d at 752.

Petitioner attempts to fashion an argument that would warrant the involvement of the Court by accusing the Sixth Circuit of judicially eliminating the words "state or local government"(Pet. Brief p. 10) and engaging in improper statutory re-construction. The Petitioner's allegations are without merit. The Sixth Circuit attempted to reconcile competing and inherently inconsistent provisions so that both could remain in effect. Schmitt v. City of Detroit, 395 F.3d 327 (6th Cir. 2005); Pet Apx. A, p. 6a. When the court could not reconcile the conflicting provisions, it hesitantly and reluctantly examined the legislative history to ascertain the legislative intent. Id.

While courts are hesitant to look at legislative history, reviewing the Legislative history in light of conflicting language to find reliable interpretive help is permissible. See generally, Doe v. Chao, supra ,540 U.S. 614, 622-623. The review of the history indicates a clearly expressed legislative intent that the Act would not apply to local and state agencies. 1974 U.S. Code Cong. & Adm News 6916, 6932-34.

The Sixth Circuit opinion correctly reviewed the legislative history and held:

> While we are hesitant to rely upon legislative history, n2 in this instance it overwhelmingly supports the view that the Privacy Act applies exclusively to

federal agencies. Not only was § 7(b) of Pub. L. 93-579 included in the notes to *5 U.S.C. § 552a,* so too was §2, the "Congressional Findings and Statement of Purpose," which contains the following finding: "The privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by *Federal* agencies." Pub. L. 93-579, § 2(a)(1), 88 Stat. 1896 (emphasis added). In the same vein, Congress stated, "The purpose of this Act. ... is to provide certain safeguards for an individual against an invasion of personal privacy by requiring *Federal* agencies ... to [*inter alia*] ... be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act." Pub. L. 93-579 § 2(b) (emphasis added). Furthermore, Senate Report 93-1183, which is dated September 26, 1974, contains the following discussion of the Privacy Act's application to entities beyond the federal government:

> COVERAGE: PRIVATE, STATE AND LOCAL
>
> As reported, the bill applies to Federal personal information systems, whether automated or manual, and to those of State, local and private organizations which are specifically created or substantially altered through grant, contract or agreement with Federal agencies where the agency causes provisions of the act to be applied to such systems or files or relevant portions.
>
> As introduced, S. 3418 applied to all governmental and private organizations which maintained a personal information systems,

> under supervision of a strong regulatory body, with provision for delegating power to State instrumentalities.
>
> The Committee has cut back on the bill's original coverage and ordered the Privacy Commission to make a study of State, local and private data banks and recommend precise application of the Act where needed.

1974 U.S.C.C.A.N. 6916, *6932-6933. At least one court has cited Senate Report 93-1183 in holding that the Privacy Act applies only to federal agencies. *Polchowski,* 714 F.2d at 752. If nothing else, the report indicates that Congress considered a broader application of the statute but held off pending further study. Finally, plaintiff cites us to nothing in the legislative history of the statute that would indicated that Congress viewed the dissemination of social security numbers differently than it did other records. See 1974 U.S.C.C.A.N. 6916, 6943-46 (discussing privacy concerns related to use of social security numbers but recognizing legitimate uses by entities other than the federal government and recommending further study by the Privacy Commission). Pet. Apx. A, p. 7a. (all emphasis in the original).

The 11th Circuit's Schwier opinion would have this Court to ignore the specific definition of the term agency as defined by the Act, which specifies what agencies to which the Act applies. The Schwier decision's tortured reading of the Act asserts that local and state agencies can be subject to the Act in spite of the language of the Act and the legislative history to the contrary. If Congress had intended to authorize actions against local agencies it would have done so explicitly.

When the Sixth Circuit analysis is viewed as a whole, it properly reviewed the statutory language of the Act utilizing sound judicial restraint and interpretation. Petitioner's substantive argument is nothing more than a claim that the Sixth Circuit got it wrong. In fact, weighing the law compels the opposite conclusion. Even if the Sixth Circuit "erred" in the context of this case , it is an insufficient basis on which to grant a petition for a writ of certiorari in light of the fact that in the instant case the City may request disclosure of SSN for tax purposes and in light of the record.

Petitioner cannot assert the violation of a federal right because he admitted he had not been denied any right and because the Social Security Act requires him to disclose his SSN for tax collection purposes. The Supreme Court has pointed out that not all federal statutes create rights remediable by § 1983: "To seek redress through § 1983 ... a plaintiff must assert the violation of a federal *right*, not merely violation of a federal *law*." Blessing v. Freestone, 520 U.S. 329, 340, 117 S. Ct. 1353, 137 L. Ed.2d 569 (1997) (emphasis in original). The Privacy Act of 1974 does not clearly and unambiguously create a private right of action against state and local actors or agencies. If Congress wishes to create new rights it must do so in clear and unambiguous terms. Gonzaga University v. Doe, 536 U.S. 273, 122 S.Ct. 2268, 2278-79, 153 L.Ed.2d 309 (2002).

The Court in Gonzaga also explained that "even where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent "to create not just a private right, but also a private remedy." Gonzaga, 122 S. Ct. at 2274; Alexander v. Sandoval, 532 U.S. 275, 289, 121 S. Ct. 1511, 149 L.Ed.2d 517 (2001). The Privacy Act language

does not clearly create a private right or remedy against municipalities.

Although the protection afforded by the Privacy Act is broad, its civil remedy provision is far less expansive. Dittman v. State of California, 191 F.3d 1020, 1026 (9th Cir. 1999). The private right of civil action, created by the Privacy Act, is specifically limited to actions against agencies of the United States Government. The statutory language of the Privacy Act does not suggest that Congress created a private right or private remedy against state and municipal agencies. The law and the legislative history negate such a determination. Clearly,the civil remedy provision of the statute does not apply against local and state agencies. Cardamone v. Cohen, 241 F.3d 520, 524 (6th Cir. 2001) (finding that the Privacy Act borrows the definition of "agency" from the Freedom of Information Act, which defines "agency" as a federal agency).

CONCLUSION

For the foregoing reasons, Respondents request that this Honorable Court deny the Petition for Writ of Certiorari .

Respectfully submitted,

LINDA D. FEGINS (P31980)
Counsel of Record
CITY OF DETROIT LAW DEPARTMENT
660 Woodward Avenue, Suite 1650
Detroit, MI 48226
(313) 237-3022

Attorney for Respondents